Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

AT&T CORP.,

Petitioner,

v.

BOBBY GENE ALLEN AND DEBORAH JANE ALLEN,
ON BEHALF OF THEMSELVES
AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition for Writ of Certiorari to the Oklahoma Court of Civil Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether fundamental principles of State sovereignty and the Due Process Clause of the Fourteenth Amendment prohibit a state court in Oklahoma from asserting jurisdiction over claims challenging the collection of a municipal sales tax in 27 other states by certifying a class action encompassing the claims of customers from those 27 states.

CORPORATE DISCLOSURE STATEMENT

Petitioner AT&T Corp. has no parent company and no publicly held corporation owns 10% or more of petitioner's stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioner AT&T Corp. respectfully requests that a writ of certiorari issue to review the judgment of the Oklahoma Court of Civil Appeals in this case.

OPINIONS BELOW

The initial opinion of the Oklahoma Court of Civil Appeals, issued is unpublished and can be found in the Appendix ("App.") at 18a-33a. The opinion on rehearing of the Oklahoma Court of Civil Appeals is also unreported and can be found in the Appendix at 1a-17a. The order of the Oklahoma Supreme Court denying review of the Oklahoma Court of Civil Appeals decision can be found in the Appendix at App. 59a. The Oklahoma district court decision granting respondents' motion for class certification is unpublished and can be found in the Appendix at 34a-58a.

JURISDICTION

The opinion on rehearing of the Oklahoma Court of Civil Appeals was issued on June 10, 2003. Petitioner timely filed for review with the Oklahoma Supreme Court. A divided Oklahoma Supreme Court denied review, 5 to 4, on September 29, 2003. On December 19, 2003, Petitioner moved for an extension of time to file this Petition for Certiorari. Justice Breyer issued an order granting an extension up to and including January 18, 2004.[1]

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257. While the decision under review did not terminate the litigation in the state court, the decision is nonetheless "final" for purposes of § 1257 under *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975).

> "[T]he federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and ... reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action ... [and] a refusal immediately to review the state-court decision might seriously erode federal policy...."

Id. at 482-83. The federal issue presented here—whether an Oklahoma court has the power to entertain claims arising out of the tax collection process in other States—has been finally decided by the Oklahoma courts. This Court's review at a later date might be prevented if petitioner were to prevail on the merits. Were this Court to hold, as petitioner contends,

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[1] The Clerk's office has confirmed that, because January 18 is a Sunday, and January 19 is a federal holiday, Justice Breyer's order effectively extended the time for filing until January 20, 2004. *See* Sup. Ct. R. 30.1 (the last day "of any period of time prescribed . . . by order of the Court" shall not include any Sunday or federal legal holiday).

that the Oklahoma courts lack the power to entertain such out-of-state tax collection claims, this Court would preclude any further litigation of those non-Oklahoma claims. And, finally, the question of the power of the Oklahoma court to entertain the non-Oklahoma claims implicates the substantial federal policies reflected in the Constitution's Due Process Clause, which requires the Oklahoma court to apply the laws of each customer's State to his or her claim, and its recognition of the sovereignty of each State, which would prohibit one State from interfering with the administration of another State's tax collection scheme.

This Court has not hesitated to review state court decisions, even at an early stage in the proceedings, where, as here, the federal issue presented challenges the power of the state court to hear certain claims at all. See *Mercantile Nat'l Bank* v. *Langdeau*, 371 U.S. 555, 558 (1963) (although state court had ruled on nothing more than venue, this Court considered whether the state court lacked power to hear the claim in the face of a federal statute requiring the claim to be heard in a different state court venue); *Local No. 438 Constr. & Gen. Laborers' Union* v. *Curry*, 371 U.S. 542, 546-50 (1963) (although state court had simply issued temporary restraining order, this Court considered whether the National Labor Relations Act deprived a state court of jurisdiction to hear a claim seeking a labor injunction); *Southland Corp.* v. *Keating*, 465 U.S. 1, 6-8 (1984) (reviewing whether a state court had the power to hear a dispute between a franchisor and its franchisees that appeared to be governed by the arbitration provision in the franchise agreement (thus implicating the Federal Arbitration Act), even though the arbitration question was the only issue that had been decided by the state court). As was true in the foregoing cases, the federal issue presented here is a "separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action," *Mercantile Nat'l Bank*, 371 U.S. at 558, and it would "serve[]

the policy underlying the requirement of finality in 28 U.S.C. § 1257 to determine now" where the claims should be tried, rather than to subject the parties "to long and complex litigation which may all be for naught if consideration of the preliminary question ... is postponed until the conclusion of the proceedings." *Id.*

STATEMENT OF THE CASE

This case involves the most fundamental attribute of state sovereignty: the power to administer a tax collection scheme. In the decision below, the Oklahoma Court of Civil Appeals asserted the power to disrupt the administration of the collection of municipal taxes in 27 States beyond Oklahoma. In so ruling, it has arrogated to itself a power that the highest courts of two other States have expressly recognized belongs solely to the taxing State. The New York Court of Appeals squarely rejected the approach taken by Oklahoma here. *City of Phila.* v. *Cohen*, 184 N.E.2d 167, 169 (N.Y. 1962) (stating that "[f]or our tribunals to sit in judgment on a tax controversy between another State and its present or former citizens would be an intrusion into the public affairs of another State"). And the Arkansas Supreme Court has acknowledged that it lacks authority to order tax refunds in other States. *Ferguson* v. *Kroger Co.*, 37 S.W.3d 590, 592 (Ark. 2001) (noting that state courts are "without jurisdiction to order the treasuries of other states to refund tax revenues"). It is uniquely the role of this Court to clarify and police the fundamental principles of state sovereignty that require Oklahoma to refrain from adjudicating claims brought by citizens of other States that involve the collection of taxes by those States.

Had the Oklahoma courts given proper respect to the sovereign authority of each State, it would have recognized that the laws of each taxpayer's own State must be applied to his or her claim under this Court's decision in *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985). *Shutts* requires

the Oklahoma courts to examine and faithfully apply the laws of the various states that require the claims asserted here to be resolved in special administrative fora. The Oklahoma Court of Civil Appeals refused to do so. This fundamental departure from the decisions of this Court and the conflict with the rulings of other state and federal courts on a matter touching upon the core sovereign powers of the States warrants this Court's review.[2]

I. Nature of the Action.

The city of Muskogee, Oklahoma requires phone customers to pay a municipal sales tax of 3.25% on long distance calls originating from within the city limits. App. 2a. Respondents, Bobby Gene Allen and Deborah Jane Allen, allege that petitioner charged them for the Muskogee municipal tax even though they live in an unincorporated area outside the city. *Id.* Respondents allege that AT&T's action constituted breach of contract. *Id.* at 3a. In addition to a restitution of municipal taxes paid, respondents sought a declaratory judgment and an injunction prohibiting AT&T from imposing the tax charge where it is not authorized. *Id.*

Respondents have asserted their claims not only on their own behalf, but also on behalf of customers who were charged municipal taxes and who allegedly live outside the taxing jurisdiction of the relevant municipality. Critically, the class respondents sought to certify was not limited to residents of Oklahoma, but extended also to customers in every state where municipalities are permitted to impose sales taxes on long distance telephone calls:

> Alaska, Arkansas, Arizona, California, Colorado, Florida, Iowa, Illinois, Kansas, Kentucky, Maryland, Minnesota, Mississippi, Missouri, Nebraska, New York,

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[2] AT&T does not here challenge the authority of Oklahoma courts to resolve the claims brought on behalf of Oklahoma customers regarding the imposition of municipal taxes in Oklahoma.

Ohio, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, Wisconsin, West Virginia, and Wyoming.

App. 3a. In effect, respondents have sought an order from the Oklahoma court requiring a refund of taxes and an injunction against the imposition of taxes in 27 States in addition to Oklahoma.

II. State Tax Collection/Refund Procedures.

At all times relevant to this case, AT&T was and is obligated by law to collect and remit taxes imposed on long-distance telephone service and acts as an agent or trustee for each State or municipality that imposes the tax. In Oklahoma, for example, as a licensed vendor, AT&T holds all taxes collected "in trust" for the State of Oklahoma and, "as trustee, . . . ha[s] a fiduciary duty to the State of Oklahoma in regards to such sums and shall be subject to the trust laws of this state." Okla. Stat. tit. 68, § 1361(F). Other state laws include similar language. See, for example, N.Y. Tax Law § 1132 (a)(1) ("The tax shall be paid to the person required to collect it as trustee for and on account of the state."); Tex. Tax Code Ann. § 111.016(a) (person collecting tax holds it "in trust for the benefit of the state"). In its role as agent or trustee for each State, AT&T is subject to statutory and regulatory requirements governing the collection and remittance of taxes in each State in which it provides long-distance telephone service. Pursuant to the various regulatory requirements, AT&T collects the mandated tax and forwards the funds collected to the appropriate jurisdiction. AT&T retains only a small amount, authorized by the local taxing authority, to cover its costs of maintaining appropriate records of its tax collections on behalf of the municipality.

To fulfill this obligation of identifying the tax liability for millions of customers, since the 1990s AT&T has used state of the art computer software to identify whether a given call was made from within or outside of a municipal taxing

authority. Any error made by the software in determining whether a particular customer is included within a taxing jurisdiction is unintentional and an unavoidable consequence of using the best available technology for the massive task involved. Significantly, the financial benefit of such an error does not run to AT&T because, as noted above, AT&T passes along the tax (minus a small amount to cover its administrative costs) to the appropriate taxing authority.[3]

Taxpayers do not have the same freedom to sue for a refund of taxes erroneously collected, or to enjoin the collection of taxes, as they have to file a garden variety tort suit. Because the various States use vendors such as AT&T as tax collectors, and the vendors do not actually benefit financially from their role as tax collectors, States have established special and exclusive procedures for aggrieved citizens who claim to be wrongly assessed a tax. Those procedures relate both to *where* claims like those asserted by respondents can be brought and against *whom* they may be asserted.

For example, New York has established a tax commission for customers seeking a refund of taxes "erroneously [or] illegally" collected. N. Y. Tax Law § 1139(a). And New York has made clear that the remedies the tax commission is authorized to provide are the exclusive remedies available to customers, going so far as to expressly prohibit injunctions or declaratory judgments of any "proposed determination of tax." *Id.* § 1140. Indeed, in New York, "[a] dissatisfied taxpayer's recourse is ... against the taxing body" not the vendor. *Davidson* v. *Rochester Tel. Corp.*, 558 N.Y.S.2d 1009, 1011 (App. Div. 1990). New York permits judicial review of the administrative body's decision, but only after the customer has exhausted his or her administrative remedies. *Id.*

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[3] As evidence of this emerged in this litigation, respondents abandoned their claims based on allegations that AT&T retained the tax monies.

Texas allows suit in a court, not an administrative body, but it specifies which court. Tex. Tax Code Ann. § 112.001 (Travis County, Texas); *Serna* v. *H.E. Butt Grocery Co.*, 21 S.W.3d 330, 335 (Tex. Ct. App. 2000) (stating that Zavala County district court lacks jurisdiction over suit seeking repayment of allegedly overpaid taxes). Like New York law, Texas law does "not contemplate direct action against the *vendor* who collects the sales tax on the state's behalf." *Id.* at 333. And Texas law specifies who must be sued, Texas Tax Code Ann. § 112.053(a) (the comptroller and the attorney general), prerequisites to suit, *id.* § 112.052 (payment with a notice of protest), and prerequisites for suits seeking an injunction, *id.* § 112.101 (*inter alia*, notice to the attorney general that an injunction will be sought).

Other States included within the scope of the class certified in this case restrict the freedom of taxpayers to sue vendors that have collected taxes on the government's behalf. See, for example, *P.R. Mktg. Group, Inc.* v. *GTE Fla., Inc.*, 747 So. 2d 962 (Fla. Dist. Ct. App. 1999) (holding where a tax refund is claimed on any basis other than the unconstitutionality of the tax, the administrative remedies provided under the Florida Tax Code were exclusive); *McManus* v. *State, Dep't of Revenue & Fin.*, 499 N.W.2d 726, 727 (Iowa 1993) (claimant seeking tax refund must first exhaust administrative remedies); *Parker* v. *Giant Eagle, Inc.*, No. 01 C.A. 174, 2002 WL 31168571, at * 4 (Ohio Ct. App. Sept. 26, 2002) (claim brought by customer against vendor for improperly calculated sales tax must be brought in court of claims and not in court of general jurisdiction); *Heaven* v. *Rite Aid Corp.*, No. 0596, 2000 WL 33711049, at *2 (Pa. Ct. Com. Pl. Oct. 27, 2000) (holding "a purchaser may not bring an individual action or a class action against a vendor for refund of overcharged sales tax, regardless of whether the vendor remitted the overcharge to the Commonwealth, and regardless of whether the vendor acted intentionally or deceptively"). And some States included within the scope of the class

prohibit suits seeking tax refunds from being brought as class actions. *State ex rel. Ellsworth Freight Lines, Inc.* v. *State Tax Comm'n*, 651 S.W.2d 130, 132 (Mo. 1983) ("a class action cannot be used to claim refunds of improperly collected sales taxes") (citing *Charles* v. *Spradling*, 524 S.W.2d 820 (Mo. 1975)); *Hooks* v. *Comptroller of Treasury*, 289 A.2d 332, 333-34 (Md. 1972) (permitting customer to seek refund "in his own behalf" but concluding that there "is no warrant ... permitting him to advance a claim in behalf of others similarly situated").

III. The Decision Below.

The Oklahoma Tax Code provides that "[a]ny taxpayer who has paid to the State of Oklahoma, through error of fact, or computation or misinterpretation of law, any tax collected by the Tax Commission may, as hereinafter provided, be refunded the amount of such tax so erroneously paid, without interest." Okla. Stat. tit. 68, § 227(a). Nonetheless, the Court of Civil Appeals in this case determined that any effort by respondents to seek relief through Oklahoma's administrative procedure would be futile. App. 6a-7a. As a result, Oklahoma has decided that respondents' Oklahoma-based claim may be brought in an Oklahoma court of general jurisdiction against a vendor who collects taxes on behalf of the government. The court applied that ruling to citizens and taxpayers in 27 other States.

AT&T does not challenge in this Court the propriety of respondents proceeding in the Oklahoma courts on behalf of themselves and other similarly situated Oklahomans. AT&T does contend, however, that the Oklahoma courts lack jurisdiction over the claims asserted on behalf of non-Oklahoma citizens. Relying on the decisions cited above from New York, Texas and Florida, and this Court's ruling in *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985), AT&T explained that, before an Oklahoma court certified a multi-state class action covering the claims asserted here, it would have to assure itself that the laws of all the States covered by

the putative class action would permit the claims to be adjudicated against AT&T by an Oklahoma court. AT&T asserted that respondents' inability to make such a showing precluded certification of a multi-state class.

In considering its jurisdiction over the claims in this case, the Oklahoma Court of Civil Appeals examined only Oklahoma law in depth. It noted that "[s]ome jurisdictions have addressed the alleged overcharge of sales tax by companies providing telephone service and held that administrative remedies must be exhausted before judicial relief can be sought." App. 4a-6a (discussing *P.R. Marketing* decision from Florida and *Serna* decision from Texas). Critically, the court's discussion indicated that it looked at these decisions not as binding authority for claims asserted on behalf of Florida and Texas customers, but instead merely as potentially persuasive discussions of the issue from courts that could not bind an Oklahoma court. The court of appeals simply refused to ask whether the laws of the various jurisdictions covered by its certification order would permit this suit to be brought against AT&T in Oklahoma.

Petitioner filed a Petition for Writ of Certiorari with the Oklahoma Supreme Court, arguing, *inter alia*, that the Court of Appeals had unconstitutionally authorized an Oklahoma court's assertion of jurisdiction over claims challenging the collection of taxes in 27 of Oklahoma's sister States. The Oklahoma Supreme Court, in a 5 to 4 decision, denied the request to review this case on certiorari.

REASONS FOR GRANTING THE WRIT

The power to assess taxes and administer tax laws is an inherent attribute of state sovereignty. By affirming the certification of a multi-state class in this case, the Oklahoma Court of Civil Appeals has intruded upon the sovereignty of 27 of its sister States, disregarding their special procedures for resolving tax related claims and creating the potential that

foreign courts may disrupt the steady flow of finances into their treasuries. The highest courts of two other States have recognized that state courts lack authority to review claims challenging the administration of another State's tax laws. This conflict among the states alone warrants this Court's review. *Smiley* v. *Citibank (S. D.), N.A.*, 517 U.S. 735, 739 (1996) (noting that split of authority among state high courts "prompted [this Court] to take th[e] case").

In addition, the decision under review departs from the approach taken by two federal courts of appeals in cases seeking to certify a multi-state class for claims involving the application of the laws of various States. Applying this Court's decision in *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985), both the Fifth Circuit and the District of Columbia Circuit have required parties seeking multi-state class certification to demonstrate the compatibility of the various applicable state laws. *Castano* v. *American Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996) ("A district court's duty to determine whether the plaintiff has borne its burden on class certification requires that a court consider variations in state law when a class action involves multiple jurisdictions."); *Walsh* v. *Ford Motor Co.*, 807 F.2d 1000, 1016 (D.C. Cir. 1986) (Ginsburg, J.) (refusing to accept on "faith" representation that any variations in state law are not material and requiring "class action proponents [to] show that it is accurate"). The Oklahoma court imposed no such requirement, and as a result it ignored the legal bars to the claims asserted in this case on behalf of customers in other states. In sum, this Court's review is necessary to clarify the proper respect state courts owe to the various States when addressing their sovereign power to administer their own tax laws.

1. The Oklahoma Court of Civil Appeals' decision conflicts with the decisions of other state Supreme Courts which have recognized that the exclusive power over the administration of a state's tax laws is a fundamental part of the inherent

sovereignty of each State and thus not subject to intrusion by foreign courts. The New York Court of Appeals has recognized that "[f]or our tribunals to sit in judgment on a tax controversy between another State and its present or former citizens would be an intrusion into the public affairs of another State." *City of Phila.* v. *Cohen,* 184 N.E.2d 167, 169 (N.Y. 1962). The Arkansas Supreme Court has likewise observed that a state court is "without jurisdiction to order the treasuries of other states to refund tax revenues." *Ferguson* v. *Kroger Co.*, 37 S.W.3d 590, 592 (Ark. 2001). The Oklahoma Court of Civil Appeals, by certifying a class that sweeps within its jurisdiction the administration of the tax laws of 27 states, has taken a contrary view. The decision below approves a dramatic intrusion on the sovereignty of the States and warrants this Court's review.

The Constitution reserves to the States "a substantial portion of the nation's primary sovereignty, together with the dignity and essential attributes inherent in that status." *Alden* v. *Maine*, 527 U.S. 706, 714 (1999). A primary attribute of the sovereignty of any government is the power to control the flow of finances into and out of state coffers, without which no government can function. This Court has repeatedly recognized the importance of a State's taxing power.

> "It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible."

Dows v. *City of Chi.*, 78 U.S. (11 Wall.) 108, 110 (1870). From the earliest days of the republic to the present this Court has consistently acknowledged that "the power to promulgate and enforce ... tax laws is an essential attribute of sovereignty." *Franchise Tax Bd.*. v. *Hyatt*, 123 S. Ct. 1683, 1690 (2003); *Franchise Tax Bd.* v. *United States Postal Serv.*, 467 U.S. 512, 523 (1984) ("'[T]axes are the life-blood of government.'"); *Rosewell* v. *LaSalle Nat'l Bank*, 450 U.S.

503, 522 (1981) (referring to "'the imperative need of a State to administer its own fiscal operations'"); *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 428 (1819) (noting that the "original right of taxation ... is essential to the very existence of government"). Put simply, it is the gravest of intrusions on the sovereignty of a State for some foreign tribunal to assume the authority to issue orders affecting the administration of the state's tax laws.

The critical importance of leaving the States in control of the administration of their own tax laws had led this Court to "adopt a hands-off approach with respect to state tax administration." *National Private Truck Council, Inc.* v. *Oklahoma Tax Comm'n*, 515 U.S. 582, 586 (1995). For example, in *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), this Court recognized that the States' "exceedingly strong interest in financial stability" warrants setting aside the normal Due Process requirement of the opportunity for predeprivation review when a taxpayer challenges the imposition of a tax as unlawful. *Id.* at 36-37. States have the right to collect taxes as they see fit, and may even employ aggressive procedures to ensure timely payment *before* a dispute is resolved without running afoul of the Due Process Clause. *Id.* at 37.

Similarly, this Court has consistently rejected claims that Section 1983, by virtue of the Supremacy Clause, authorizes courts, whether state or federal, to issue injunctions or provide monetary relief for violations of state tax laws so long as the taxing state itself provides for an adequate remedy. *National Private Truck Council*, 515 U.S. 582 (1995) (holding that state courts have no authority to order declaratory or injunctive relief under § 1983 for allegedly unlawful state taxes so long as adequate remedy exists under state's own law); *Fair Assessment in Real Estate Ass'n* v. *McNary*, 454 U.S. 100 (1981) (holding that § 1983 does not authorize suit in federal court seeking monetary relief for imposition of allegedly unconstitutional state tax); *Matthews*

v. *Rodgers*, 284 U.S. 521 (1932) (holding that federal courts lack authority to enjoin collection of state taxes alleged to be imposed in violation of the Constitution). This narrow interpretation of § 1983 has consistently been adopted in light of a "scrupulous regard for the rightful independence of state governments ... and a proper reluctance to interfere ... with their fiscal operations." *Id.* at 525; *National Private Truck Council*, 515 U.S. at 589 (stating "we must interpret § 1983 in light of the strong background principle against federal interference with state taxation").[4]

The States' sovereign interest in administering their own tax laws merits as much respect from other state courts as it does from federal courts. "After all, an injunction issued by a state court ... is just as disruptive as one entered by a federal court." *National Private Truck Council*, 515 U.S. at 591. That is why this Court has emphasized that redress for an allegedly unlawful tax, or an unlawfully administered tax, must be sought in the taxing State itself, in accordance with whatever procedures and limitations the State has seen fit to prescribe. *McNary*, 454 U.S. at 116 (stating that "taxpayers must seek protection of their ... rights by state remedies"); *Matthews*, 284 U.S. at 526 (leaving "the aggrieved party ... to [the] remedy in the state courts"). That is why, as noted above, the Arkansas Supreme Court has observed that a state court is "without jurisdiction to order the treasuries of other states to refund tax revenues." *Ferguson*, 37 S.W.3d at 592. And that is also the reason the New York Court of Appeals has recognized that "[f]or our tribunals to sit in judgment on a tax controversy between another State and its present or former citizens would be an intrusion into the public affairs of another State." *City of Phila.*, 184 N.E.2d at 169.

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[4] Congress, in the Tax Injunction Act, 28 U.S.C. § 1341, has demonstrated that it believes States should enjoy independent control over the administration of their tax schemes by prohibiting federal courts from enjoining the collection of state taxes where the State provides "a plain, speedy and efficient remedy."

In direct conflict with these rulings from the highest courts of its sister States, the Oklahoma Court of Civil Appeals in this case disregarded the fundamental sovereign interests of the 27 other States included within its certification order. Instead of recognizing that its authority is limited to overseeing the collection of sales taxes within Oklahoma alone, the Oklahoma Court of Civil Appeals asserted the authority to provide tax refunds and to enjoin the collection of taxes within the jurisdiction of 27 other States. It did so without regard to the remedies available to taxpayers within those 27 other States. And it offered no explanation to support an Oklahoma court forum to adjudicate the tax dispute at issue here.

Indeed, respondents themselves presented evidence of the dramatic intrusion on state sovereignty their own request entails. Respondents noted that the state of California sued AT&T over the allegedly improper collection of municipal sales taxes in Ventura County, California. AT&T and California entered into a consent decree in that case that requires AT&T to eliminate only those customers that AT&T knows about or by the exercise of reasonable care should have known, to be not subject to the tax. California has thus determined that its tax laws should be administered according to a standard of "reasonable care" in light of existing technology as determined by the State of California and AT&T, and the California court enforcing its injunction if the two parties disagree. By including California within the scope of the class certification ruling in a case in which plaintiffs seek to impose a kind of strict liability obligation, the Oklahoma court has cast doubt on California's exclusive control over its taxing scheme.

The Oklahoma court's intrusion on state sovereignty is subject to remedy only by this Court. The courts of California, or Texas, or New York have no capacity to review the rulings of Oklahoma courts, and thus have no opportunity to protect their own States' sovereign interest in the orderly

administration of their tax laws. This Court's appellate jurisdiction provides the only effective mechanism to vindicate "the Constitution's special concern ... with the autonomy of the individual States within their respective spheres." *Healy* v. *Beer Inst., Inc.*, 491 U.S. 324, 335-36 (1989).

2. The States' sovereign interests are also threatened by the Oklahoma Court of Civil Appeals' refusal to require respondents to demonstrate that the laws of the various States authorize a court of general jurisdiction to resolve their claims. As this Court long ago explained, there are "barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends. This is so obviously the necessary result of the Constitution that it has rarely been called in question and hence authorities dealing with it do not abound." *New York Life Ins. Co.* v. *Head*, 234 U.S. 149, 161 (1914). The clearest of these restrictions, and one which this Court has had occasions to explore, involves the importance of preventing one State from extending its legislative power to other jurisdictions.

In *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996), this Court noted that "it follows from ... principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." *Id.* at 572; *Head*, 234 U.S. at 161 ("[I]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State."); *Huntington* v. *Attrill*, 146 U.S. 657, 669 (1892) ("Laws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extra-territorial effect only by the comity of other States."). The Due Process Clause thus prevents a State from exercising "'extraterritorial jurisdiction,' that is, to regulate and control activities wholly beyond its boundaries." *Watson* v. *Employers Liab. Assurance Corp.*, 348 U.S. 66, 70 (1954).

When presented with a request for certification of a multi-state class in a case involving the application of state, not federal, law, the Due Process Clause plays a special role in protecting the sovereign interests of the States. Under this Court's decision in *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985), a state court may not apply its local law to claims that have no connection whatsoever to the forum State. This Court stressed that a forum State must have "'significant contact or significant aggregation of contacts'" to the claims of each class member (*i.e.*, "contacts 'creating state interests'") in order to ensure that application of the forum State's law is not arbitrary or unfair. *Id.* at 821-22. Kansas, the state court involved in *Shutts*, was held to have no authority to "'abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them.'" *Id.* at 822.

Even if it were appropriate for an Oklahoma court to resolve a dispute regarding the assessment and collection of taxes in another State, under *Shutts* the Oklahoma court would have to apply the laws of each customer's own State to his or her claim. Oklahoma law cannot be extended to cover claims brought on behalf of customers in States outside Oklahoma because there is no connection between those claims and Oklahoma. *Allstate Ins. Co.* v. *Hague*, 449 U.S. 302, 310-11 (1981) (acknowledging that "if a State has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional"). To ensure that Oklahoma law is not given extraterritorial application, then, the Oklahoma court must acquaint itself with and apply the laws of the various States included within its certification order.

Under similar circumstances, federal courts of appeals have made clear that the burden rests solidly on the party seeking certification to demonstrate whether and how the laws of the various jurisdictions can effectively be applied before certifying a multi-state class. This necessarily involves a

thorough review of the applicable state laws. *Castano*, 84 F.3d at 741 ("A district court's duty to determine whether the plaintiff has borne its burden on class certification requires that a court consider variations in state law when a class action involves multiple jurisdictions."); *Walsh*, 807 F.2d at 1016 (Ginsburg, J.) (refusing to accept on "faith" representation that any variations in state law are not material and requiring "class action proponents [to] show that it is accurate").

The Oklahoma Court of Civil Appeals in this case failed to conduct the required review. Instead, it allowed this case to proceed as a multi-state class based solely on its examination of the Oklahoma Tax Code and without regard to the substantive and procedural jurisdictional problems apparent from a review of the laws of other States. As a consequence, Oklahoma courts will hear tax challenges by some putative class members who paid taxes to States that bar courts of general jurisdiction from hearing such claims, and/or that require such claims be filed in administrative or specialized courts. The Oklahoma court's conclusions that *Oklahoma law* does not limit "pursuit of a remedy against a third party who collected some erroneous amount" of city or municipal sales tax, App. 4a, or that the administrative remedies *Oklahoma law* provides "would likely present an insurmountable barrier to the individual customer seeking redress," *id.* at 6a, provide no justification for ignoring or overriding the contrary judgments of *other* state legislatures and courts.

In fact, several of the jurisdictions included within the certification order reject the approach the Oklahoma courts have adopted for Oklahoma. Pennsylvania, for instance, refuses to allow its courts of general jurisdiction to hear the claims respondents have asserted on behalf of Pennsylvania customers. *Heaven* v. *Rite Aid Corp.*, No. 0596, 2000 WL 33711049 (Pa. Ct. Com. Pl. Oct. 27, 2000). In *Heaven*, the plaintiff alleged that Rite Aid was fraudulently charging its

customers excessive sales tax. The court held that the Pennsylvania tax statutes provided the exclusive remedies for a tax refund and refused to create a common law remedy, notwithstanding the plaintiff's class action allegations:

> The tax code sets forth a comprehensive scheme for collection and refund of sales taxes, including provisions giving the Commonwealth recourse against dishonest vendors. The tax code imposes criminal penalties on vendors who file fraudulent returns. The tax code imposes civil penalties on vendors who underpay or understate sales tax. By enacting this comprehensive scheme, the legislature has vested exclusive jurisdiction over sales tax matters in the Department of Revenue. The court will not create a common law remedy to add to this comprehensive statutory scheme.

Id. at *5 (citations omitted). The *Heaven* court rejected the same practicality argument that the Oklahoma court found persuasive.

> The impracticality of requiring all of Rite Aid's overcharged customers to file a petition for a refund does not relieve Heaven of the exhaustion requirement. That impracticality would be relevant to class certification. It would not be relevant to whether Heaven may bring an action at all.

Id. at *4 (citations omitted) (citing *Lilian* v. *Commonwealth*, 354 A.2d 250, 254 (Pa. 1976)). Pennsylvania, acting as a sovereign power concerning the manner in which sales taxes are collected, has established an orderly procedure for resolving disputes. The Oklahoma court, ignoring Pennsylvania's sovereign prerogatives, has refused to respect it.

Likewise, the Oklahoma court has refused to respect Texas's choice for resolving tax related claims. *Serna* v. *H.E. Butt Grocery Co.*, 21 S.W.3d 330 (Tex. Ct. App. 2000). In *Serna,* the plaintiff brought a lawsuit against a grocery store,

alleging that the store fraudulently overcharged state sales tax. The *Serna* court held that because the plaintiff was seeking a refund of overcharged sales tax, the trial court did not have jurisdiction to resolve the case. *Id.* at 336. For the Texas court, unlike the Oklahoma court in this case, it did not matter that the claim was brought against a vendor charged with collecting sales tax; the suit was effectively a challenge to the collection of the tax that ultimately benefited the government. *Id.* at 335 (holding that "this lawsuit ... claiming taxes were collected in an amount greater than the legal rate, actually amounts to a suit for a tax refund as if the suit had been filed against the Comptroller"). The *Serna* court also acknowledged that Texas's procedure for resolving tax related claims reflects a policy judgment on the fundamental issue of how to manage state finances.

> [T]he Comptroller is vested with authority over an administrative mechanism in the Tax Code that makes the most efficient use of the Comptroller's administrative functions in the areas of tax collection and refunds. Allowing parties to circumvent this process undermines the very administrative efficiency that it seeks to achieve.

Id. at 334. Despite the clear import of the holding in *Serna*—there is no jurisdiction over respondents' claims asserted on behalf of Texans—the Oklahoma Court of Civil Appeals refused to give *Serna* controlling effect merely because it "did not deal with a class action claim, nor did it involve a claim for injunctive relief." App. 5a.

New York, like Texas and unlike Oklahoma, refuses to allow customers to evade the specialized procedures created to resolve tax claims merely by suing the vendor that collects the tax on behalf of the State. *Davidson* v. *Rochester Tel. Corp.*, 558 N.Y.S.2d 1009 (App. Div. 1990). In *Davidson*, a residential telephone subscriber filed a class action lawsuit against a telephone company, challenging the legality of the company's practice of collecting state sales tax on "'end user

common line'" charges and seeking reimbursement of the charges. *Id.* at 1010. The New York court rejected the claim.

> We concur with RTC's contention that plaintiff has no cause of action against it in that its role in the collection of the sales tax is merely a ministerial act. RTC is designated by law to collect the taxes and as such it has no right to question the underlying validity of the tax but must turn it over to the proper authority. Failure to collect the tax would have exposed RTC to liability and subjected it to possible penalties. Having collected the taxes, RTC's responsibility has ended. A dissatisfied taxpayer's recourse is then against the taxing body.

Id. at 1011. (citations omitted).

Florida refuses to allow a court of general jurisdictional to hear a claim for a tax refund, unless the claim asserts that the tax is unconstitutional. *P.R. Mktg. Group, Inc.* v. *GTE Fla., Inc.*, 747 So. 2d 962 (Fla. App. 1999). The *P.R. Mktg.* court acknowledged this rule in a case seeking certification of a state-wide class against a telecommunications company and the Florida Department of Revenue alleging that sales tax had been improperly imposed. As the *P.R. Mktg.* court recognized, "[t]he Florida supreme court ... [had held] that a taxpayer is required to first apply for a refund pursuant to the relevant statute before filing suit," *Id.* at 964, the effect of which is to prevent class certification, at least until all putative class members have sought refunds from the appropriate administrative body. The Oklahoma court in this case apparently believes this requirement is inefficient, App. 5a n.4, and disregarded it.

Because the Oklahoma Court of Civil Appeals failed to follow the procedures specified in *Shutts* and adopted by the Fifth and District of Columbia Circuits, it did not examine the controlling law of the States involved. Had it done so, it would have recognized that the law of numerous jurisdictions prohibits the claims asserted here when brought on behalf of

out-of-state plaintiffs, and denied class certification. Instead, in a decision that conflicts with both federal circuit court and state high-court rulings, the Oklahoma court improperly certified a multi-state class.

* * * *

The certification of this multi-state class action seeking tax rebates and injunctive relief relating to the administration of the tax laws of States beyond Oklahoma strikes at the heart of the relationship among the independent sovereign States that make up the union. This Court's decisions, as well as those of other state Supreme Courts counsel a special respect for the taxing authority, which is a core sovereign power of any State. The Oklahoma Court of Civil Appeals has rejected these precedents by asserting its authority to regulate the tax law in 27 other States. There is no other tribunal in a position to review the approach taken by the Oklahoma courts in this case, and to clarify the proper respect the courts of each State owe sovereign powers of the various States in putative class claims challenging state tax laws.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE COURT OF CIVIL APPEALS
STATE OF OKLAHOMA
DIVISION II

[Filed June 10, 2003]

Case No. 97,916
Not for Official Publication

BOBBY GENE ALLEN and DEBORAH JANE ALLEN,
on behalf of themselves and all others similarly situated,
Plaintiffs/Appellees,

vs.

AT&T CORPORATION,
Defendant/Appellant.

APPEAL FROM THE DISTRICT COURT OF
MUSKOGEE COUNTY, OKLAHOMA

HONORABLE MIKE NORMAN, TRIAL JUDGE

OPINION ON REHEARING AFFIRMED

OPINION ON REHEARING BY RONALD J. STUBBLEFIELD, JUDGE:

This is an appeal by defendant AT&T Corporation from an interlocutory trial court order certifying a class action lawsuit.[1] On March 18, 2003, we issued an opinion affirming the lower court's judgment. However, we have granted rehearing to address an issue raised by Defendant. Based on

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[1] Such an order is appealable by right pursuant to 12 O.S.2001 § 993(6).

additional review of the record on appeal, the issues raised by the parties, and applicable law, we affirm.

BACKGROUND

Plaintiffs, Bobby Gene Allen and Deborah Jane Allen, a married couple, are customers of AT&T, the telecommunications company. AT&T provides Plaintiffs with their long distance telephone service. Plaintiffs live in an unincorporated area outside the City of Muskogee.

Plaintiffs' lawsuit concerns the validity of a municipal sales tax charge included in their monthly long distance bill. Many cities, including Muskogee, require phone customers to pay this tax, which is separate from the sales tax levied on telephone use by the state. For example, the State of Oklahoma levies a 4.5 percent state sales tax, and the City of Muskogee charges a 3.25 municipal sales tax. Because Plaintiffs live in an unincorporated area outside Muskogee, their long distance charges are subject to the state tax but not the municipal tax.

Plaintiffs asserted that AT&T charged the same municipal tax for all its customers residing in any one zip code, even those customers residing outside city limits. Plaintiffs produced one of their monthly AT&T bills, showing they had been charged the Muskogee municipal sales tax as well as the Oklahoma sales tax. Plaintiffs asserted AT&T was wrongfully collecting this money from nonresidents of any given city, remitting to the taxing authorities the amount properly owed, and pocketing the improperly charged amount "[i]n order to enhance profits and reduce accounting costs." Plaintiffs acknowledged that after contacting AT&T about the problem, they received a one-month credit of 74 cents and were no longer being charged the tax.

Plaintiffs filed their petition, individually and as a class action, seeking damages for restitution, fraud,[2] and breach of contract. Plaintiffs also sought declaratory relief and an injunction prohibiting AT&T from imposing the charge where unauthorized.

AT&T denied charging a flat rate per zip code to its customers, admitting only that a previously-used computer software system had resulted in billing errors, including some related to whether a customer lived inside or outside a city's limits. AT&T asserted it had issued credits to customers who were improperly billed.

AT&T filed a motion to dismiss, asserting that the Trial Court lacked jurisdiction because Plaintiffs did not seek a tax refund from the Oklahoma Tax Commission before filing their lawsuit. The Trial Court denied the motion.

After receiving a good deal of evidence and conducting a hearing, the Trial Court issued a 27-page order granting class certification, with the class defined as:

> All AT&T customers, residing in one of the following states, that were charged money as a city or a municipal tax on long distance services made from their service location where they did not reside within the incorporated boundaries of that city or municipal taxing jurisdiction:
>
> Alaska, Arkansas, Arizona, California, Colorado, Florida, Iowa, Illinois, Kansas, Kentucky, Maryland, Minnesota, Mississippi, Missouri, Nebraska, New York, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, Wisconsin, West Virginia, Wyoming.[3]

AT&T appeals.

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[2] Plaintiffs did not attempt to certify the fraud claim as part of the class action.

[3] The Trial Court noted these 28 states are the only ones in the United States permitting cities to impose sales tax on long distance calls.

STANDARD OF REVIEW

In an appeal from a trial court's certification of a class action, our standard of review is whether the trial court abused its discretion. *Shores v. First City Bank Corp.*, 1984 OK 67, ¶ 4, 689 P.2d 299, 301. Class actions are governed by 12 O.S.2001 § 2023, which specifies five prerequisites for class certification. The trial court abuses its discretion if the record fails to support the conclusion that each of the five prerequisites of that statute is met. *Id.* Those prerequisites are set out and analyzed below.

DISCUSSION OF ISSUES

I. Jurisdiction

AT&T first argues, as it did below, that Plaintiffs' lawsuit should be dismissed for failure to exhaust administrative remedies. Plaintiffs did not seek a refund from the Oklahoma Tax Commission (OTC) for any amounts overpaid, and AT&T asserts that because OTC has exclusive jurisdiction over tax refunds, this case must be dismissed for lack of subject matter jurisdiction.

Oklahoma tax statutes do provide a procedure whereby taxpayers who have erroneously paid any tax can seek a refund from OTC and then, if unsuccessful, seek relief from the Oklahoma Supreme Court. However, a reading of the statutes does not reveal a limitation on pursuit of a remedy against a third party who collected some erroneous amount. Indeed, it would appear that claims such as are addressed in this lawsuit would be difficult if not impossible for an individual AT&T customer to pursue. For example, 68 O.S.2001 § 227(c) requires that a claim include specific information that an individual consumer likely would not have.

Some jurisdictions have addressed the alleged overcharge of sales tax by companies providing telephone service and held that administrative remedies must be exhausted before

judicial relief can be sought. The case of *P.R. Mktg. Group, Inc. v. GTE Fla., Inc.*, 747 So. 2d 962 (Fla. Dist. Ct. App. 1999) involved a class action, and the court denied certification because individual consumers did not file an application for refund within a specific time. However, the *P.R. Mktg.* decision was based solely on a rule specified by the Florida Supreme Court.[4]

In *Serna v. H.E. Butt Grocery Co.*, 21 S.W.3d 330 (Tex. Ct. App. 1999), the Texas Court of Appeals was faced with a case in which a grocery store admittedly overcharged sales tax to customers and then remitted the collected money, including the overage, to the State. The court held that under the Texas Tax Code a customer's exclusive remedy was to proceed through administrative channels. However, *Serna* did not deal with a class action claim, nor did it involve a claim for injunctive relief. Furthermore, a principal rationale in the *Serna* Court's decision was the possibility of numerous

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[4] The Court in *P.R. Mktg.* actually pronounced a rather harsh judgment on its decision dictated by *stare decisis*, stating:

> We are compelled to take note of the resources that may be wasted as a result of this outcome. In a case where a tax refund may affect a significantly large number of individuals, it seems impractical to require every taxpayer to file a refund application with the DOR [the taxing authority] and be denied that refund before being able to join a class action. This may leave the DOR inundated with applications and would require it to spend a significant amount of time and resources on this unvaried type of claim. Alternatively, many customers may not know that the possibility of a tax refund may exist or may not even attempt to file for a refund since their personal claim may be a nominal amount. In that case, either GTE or the DOR may be able to realize a windfall by simply taxing each customer a mere one percent more than what they are legally allowed to do, if the appellants' allegations are indeed true, without anyone knowing of a possible refund nor requesting a refund. Regardless of the potential ramifications as it applies to this case, we must follow the supreme court's holding on this matter.

P.R. Mktg., 747 So. 2d at 965.

lawsuits and inconsistent verdicts, which is actually an argument in favor of class action.[5]

AT&T claims that the evidence is that it remitted all the monies that were claimed to be overcharges to the taxing authorities, and, therefore, Plaintiffs and every other individual customer must seek refund of the overpayment directly from those authorities. However, the record indicates that AT&T's corporate policy is to refund any overcharges directly to the individual consumer—in this instance they made a partial refund to Plaintiffs. And it seems certain that many, if not most of the customers of AT&T who may have been overcharged would not know that they had been wronged. Even those that did likely would not be able to prove individual claims before OTC or other taxing authorities without access to AT&T records. Thus, the administrative remedies, which AT&T claims must be pursued, would likely present an insurmountable barrier to the individual customer seeking redress. In cases in which exhaustion of remedies is not required by statute, the requirement to exhaust administrative remedies is a prudential rule, rather than a jurisdictional bar. *Waste Connections, Inc. v. Oklahoma Dept. of Environmental Quality*, 2002 OK 94, ¶ 0, 61 P3d 219, 221. "Administrative remedies need not be exhausted if they would be ineffective, unavailable or futile to pursue." *Id.*

The question is one of jurisdiction. Did the Trial Court have jurisdiction to proceed even though Plaintiffs had not pursued an administrative remedy? Our preceding analysis leads us to conclude that the administrative remedy is effectively unavailable to these Plaintiffs as well as to the myriad

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[5] *The Serna* Court stated: "If H.E.B. had overcharged customers in several counties of this state, and the customers filed suit in their respective local district courts, the results from one trial court to another could be inconsistent. Such disparate outcomes would be unfair both to the aggrieved taxpayers as well as the state." *Serna*, 21 S.W. 3d at 334.

of other potential plaintiffs. But an even more important reason for finding that the Trial Court had jurisdiction is that a primary purpose of Plaintiffs' cause is to obtain injunctive relief, as authorized under 12 O.S.2001 § 2023(B)(2), to prevent AT&T from continuing to use practices that have resulted in considerable overpayment by customers. The administrative remedy would do nothing to prevent AT&T from continuing to use procedures which resulted in overcharge of its customers and, thus, is insufficient as a remedy. We conclude, under the facts of this case, that the Trial Court had jurisdiction to hear Plaintiffs' lawsuit.

II. The Class Action

A. Prerequisites

Title 12 O.S.2001 § 2023 states as follows:

> A. PREREQUISITES TO A CLASS ACTION. One or more members of a class may sue or be sued as representative parties on behalf of all only if:
>
> 1. The class is so numerous that joinder of all members is impracticable;
>
> 2. There are questions of law or fact common to the class;
>
> 3. The claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> 4. The representative parties will fairly and adequately protect the interests of the class.
>
> B. CLASS ACTIONS MAINTAINABLE. An action may be maintained as a class action if the prerequisites of subsection A of this section are satisfied and in addition:
>
> * * * *
>
> 2. The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby

making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

3. The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

a. the interest of members of the class in individually controlling the prosecution or defense of separate actions,

b. the extent and nature of any litigation concerning the controversy already commenced by or against members of the class,

c. the desirability or undesirability of concentrating the litigation of the claims in the particular form, and

d. the difficulties likely to be encountered in the management of a class action.

AT&T asserts that none of the five prerequisites were met.

B. Numerosity

Numerosity requires that the class be "so numerous that joinder of all members is impracticable." 12 O.S.2001 § 2023(A)(1). The Oklahoma Supreme Court has stated that this requirement is satisfied by numbers alone where the size of the class is in the hundreds. *Black Hawk Oil Co. v. Exxon Corp.*, 1998 OK 70, ¶ 17, 969 P.2d 337, 343.

The Trial Court noted in its order that AT&T, through its responses to interrogatories and the testimony of its tax director, conceded that its former zip code system used to determine local taxes was inadequate, and that new software installed in the mid-1990's indicated over a million residential customers had been improperly billed for city

taxes, resulting in overcharges of $5,000,000. The Trial Court accordingly found that this element was indisputably present and easily satisfied.

Certainly, the size of the proposed class meets the pre-requisite of numerosity. In fact, AT&T does not argue that the sheer number of potential plaintiffs identified in the class does not meet this requirement. Instead, AT&T argues that the class has not been adequately defined, as numerosity requires. *See, e.g., KMC Leasing, Inc. v. Rockwell-Standard Corp.*, 2000 OK 51, ¶ 15, 9 P.3d 683, 689. AT&T asserts that it will be difficult to identify class members, because individualized inquiries will have to be made to determine where calls originate and where customers reside.

In part, this argument is based on AT&T's "two out of three" method used to determine whether city sales tax applies. Under this method, as AT&T's tax director testified, the tax is due when two out of three factors in any call take place in a city limits: (1) the origination point (where the call is made); (2) the termination point (where the call is received); and (3) the service location, or service address (generally defined as the location of the telephone equipment from which a call is originated or, in the case of collect calls, received). AT&T asserts, for example, that when an out-of-city residential customer uses a calling card from an in-city location, individualized customer records will have to be examined to determine if the tax is due.

We disagree with AT&T's argument for several reasons. First, as a practical matter, this appears to be no more a problem than in other consumer class actions, in which prospective members are identified through receipts, bills, or customer records. Given the detailed information provided in the AT&T bills submitted into the record, and AT&T's own detailed customer information system, we do not see this as a reason to defeat certification. The Trial Court's order, in fact, notes the testimony of the tax director to the effect that

identification of class members could be accomplished using AT&T's existing information.

Second, the Trial Court's order appears to minimize some of the problems associated with identification. It limits the class to customers making long distance calls "from their service location," which would by definition be calls made from outside a city limits.

Third, the facts of the instant case are clearly different than those in *KMC*, upon which AT&T relies. *KMC* involved an action filed by purchasers of the Aero Commander aircraft. There, the Supreme Court concluded, "There is no single course of conduct by appellees alleged to have caused injury and it is impossible for claims to be based upon one legal theory as to all appellees." *Id.* at ¶ 16, 9 P.3d at 689. In contrast, Plaintiffs assert AT&T committed a single course of conduct that injured everyone in the class in the very same way. We conclude the record supports the finding of numerosity.

C. Commonality

Commonality requires that there are "questions of law or fact common to the class." 12 O.S.2001 § 2023(A)(2). There is little question that this requirement is satisfied. Each potential class member is a customer of AT&T; each resides outside a city limit; each has allegedly been wrongly billed for a municipal tax; and each has allegedly been damaged in an identical manner by identical acts committed by AT&T. Whether AT&T acted tortiously, and whether it is liable for its acts, are common questions. The Trial Court addressed this prerequisite in its order as follows:

> As the Federal court noted in its order remanding this case, the crux of this case is whether individuals living in an unincorporated area outside of the limits of any city are subject to a charge by AT&T for a municipal sales tax on their phone bill. This is the one overwhelming central issue for all Class members.

According to AT&T, this requirement cannot be met because the Trial Court would be faced with a series of individualized questions regarding where each class member lived and how different states and local jurisdictions might treat the phrase "service location." We fail to see the logic of this argument. Determining whether a customer resides inside or outside the city limits is not a matter dependent on differing state laws. Also, the laws of the various states are similar in that it appears the city tax, wherever applied, never applies to anyone residing outside the city limits.[6]

Furthermore, an analysis of fairly recent cases supports the correctness of the Trial Court's decision regarding commonality. In *Bunch v. KMART Corp.*, 1995 OK CIV APP 41, 898 P.2d 170, the Court of Civil Appeals held that plaintiffs could not satisfy the commonality prerequisite as to common questions of fact (because each plaintiff would have to prove reliance) or of law (because different states had significant differences in their substantive law of fraud).

Bunch was subsequently distinguished by the Oklahoma Supreme Court in *Black Hawk Oil Co. v. Exxon Corp.*, 1998 OK 70, 939 P.2d 337, which involved "clearly different and more uniform actions." *Id.* at ¶ 30, 939 P.2d at 345. In *Black Hawk*, the defendants allegedly failed to account for slop oil in monthly accountings rendered by them to a specific class of oil producers. The court quoted *Newberg on Class Actions* for the principle that "[t]he need to show individual reliance has not precluded class treatment in cases where standardized written misrepresentations have been made to class members." *Id.*

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[6] For these reasons, we cannot agree with AT&T that a conflict of law problem exists at this stage of the proceedings. Under general conflict of law principles, where the laws of two or more jurisdictions would produce the same result as to the particular issue presented, there is a "false conflict" and the court should avoid the choice of law question. *Williams v. Stone*, 109 F.3d 890, 893 (3rd Cir. 1997).

Of course, the instant case does not involve a fraud theory. We mention *Bunch* and *Black Hawk* to contrast the differences among cases analyzing the commonality requirement. Certainly the facts of the instant case are closer to *Black Hawk's* facts. As in *Black Hawk*, the instant case involves standardized monthly accountings, in the form of AT&T monthly bills which either do or do not charge a customer a city tax.

Finally, there is evidence in the record indicating similarities among all the states as far as Plaintiffs' theories of restitution and breach of contract are concerned. We conclude the commonality prerequisite was satisfied.

D. Typicality

Typicality requires that the claims or defenses of the representative parties be typical of the claims or defenses of the class. 12 O.S.2001 § 2023(A)(3). This requirement is satisfied "[w]hen it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented . . . irrespective of varying fact patterns which underlie individual claims," *Ammons v. Am. Family Mut. Ins. Co.*, 897 P.2d 860, 863 (Colo. Ct. App. 1995), quoting *Newberg on Class Actions.*

The Trial Court noted in its order that Plaintiffs are AT&T customers residing outside the municipal limits of a city who were billed for and paid a municipal tax. The order further noted that they asserted that AT&T was required to charge the correct amount of tax to all customers and to refund any improperly-collected tax (retained by AT&T). The Trial Court concluded, "This core claim will be the same for all class members with an incorrect OCL [Outside City Limits] indicator."

We agree. Typicality focuses on the similarity of the legal and remedial theories behind the class members' claims.

Lobo Exploration Co. v. Amoco Prod. Co., 1999 OK CIV APP 112, ¶ 17, 991 P.2d 1048, 1055. Plaintiffs' legal theories of recovery arise from allegations of the same course of conduct equally affecting Plaintiffs and the members of the putative class. These allegations form the basis of a common theme found in Plaintiffs' claims and render those claims typical of the class.

AT&T asserts the claims of Bobby Allen are not typical in that he has no relationship with AT&T. This argument appears to be based on the fact that Mr. Allen's name does not appear on the monthly bills Plaintiffs receive from AT&T. The Trial Court dealt with this argument by correctly recognizing that Mr. Allen is married to co-plaintiff Deborah Allen, whose name does appear on the bill; that he is equally liable for the bills sent by AT&T; *and that the evidence indicated AT&T treated him as an account holder.*

AT&T also asserts that Deborah Allen's claims are not typical because, as a former AT&T employee, she received some discounts from the company. The Trial Court noted that the record did not indicate any discount affected whether Mrs. Allen was charged a municipal tax. We agree with the Trial Court's analysis.

AT&T further argues Plaintiffs' claims are not typical of the class because, following their complaint about paying municipal taxes, Plaintiffs received a credit and no longer are billed for the tax. However, it appears the credit was for one month only and there has been no showing that Plaintiffs received a credit for all months in which they paid the alleged improperly charged tax.

Finally, AT&T asserts that the tax laws of each state reveal variations in the limitations period regarding tax refunds, rendering the claims of these Oklahoma residents atypical. We find the argument without merit because, as reasoned above, this is not an action to obtain a state sales tax refund.

However, if the Trial Court later determines unique defenses exist, it can use its power to modify its order as necessary. *Shores v. First City Bank Corp.*, 1984 OK 67, ¶ 17, 689 P.2d 299, 304. We conclude the typicality prerequisite was satisfied.

E. Adequacy of Representation

This prerequisite requires that the class representatives will fairly and adequately protect the interests of the class. 12 O.S.2001 § 2023(A)(4). Class representatives are required to have a "general understanding of their position as plaintiffs with respect to the cause of action and the alleged wrongdoing perpetrated against them by the defendants." *Kalodner v. Michaels Stores, Inc.*, 172 F.R.D. 200, 209 (N.D. Tex. 1997).

Some of AT&T's arguments on this point are repetitive of earlier arguments we have considered and rejected. AT&T also asserts Plaintiffs will not be able to adequately represent the class because they lacked personal knowledge of their claims and abdicated their role to their attorneys.

As the Trial Court did, we reject this argument. At the core of this case are some basic assertions: Plaintiffs were billed for a tax; the tax is owed by residents of a municipality; Plaintiffs live outside the municipality. The Trial Court order indicates Plaintiffs understand the basic, consumer-oriented issues involved. Plaintiffs indicated they were able to identify the tax, calculate its amount, and complain to AT&T that they did not live within the taxable area. Contrary to AT&T's arguments there is no requirement that class representatives must have knowledge of the law governing telecommunication taxes or AT&T procedures. The record does not demonstrate that Plaintiffs lack personal knowledge of the underlying circumstances of the lawsuit. To the contrary, it indicates they possess the required knowledge to satisfy this prerequisite.

F. Predominance and Superiority

As a prerequisite to a class action, predominance—found at 12 O.S.2001 § 2023(B)(3)—requires the trial court to examine whether individual questions *preclude* the common questions of law or fact from being *predominant. Mattoon v. City of Norman*, 1981 OK 92, ¶ 18, 633 P.2d 735, 739.

AT&T first asserts that individual questions of fact predominate because individual analysis is required of potential class members' bills. At this stage of the proceedings, however, the record indicates that AT&T's computer software will allow such an analysis. Moreover, to deny certification on this point would be tantamount to closing the courthouse doors to any claim that involved large numbers of consumers. One of the reasons behind the existence of class action lawsuits, after all, is to assure that plaintiffs with claims too small to pursue individually will receive their day in court. *See Phillips Pet. Co. v. Shutts*, 472 U.S. 797, 809, 105 S. Ct. 2965, 2973 (1985).

AT&T also asserts individual questions of law predominate because different tax rates will be involved, depending on what each state allows its cities to levy. We do not view this as justification for decertifying the class. AT&T does not assert that any jurisdiction allows the collection of a municipal tax from those customers who reside and make calls from their service location outside a city limits. And the question of what municipal taxes AT&T actually charged members of the class also seems likely to be determined from information in AT&T's computer database.

AT&T also asserts the Trial Court will be forced to survey all of the pertinent states' statutes of limitations to determine whether each putative class member's claims are timely under his or her applicable state's limitations period. However, the existence of individual statutes of limitations defenses is not a factor that generally finds favor with courts considering

certification. *Shores v. First City Bank Corp.*, 1984 OK 67, ¶ 16, 689 P.2d 299, 304. If a sufficient number of individualized issues emerge with respect to the limitations issue, the Trial Court has the option of modifying or even decertifying the class. At this stage of the proceedings, the limitations issue is not a sufficient ground for denying certification.

Title 12 O.S.2001 § 2023(B)(3) also requires the trial court to find that the class action is *superior* to other available methods for the fair and efficient adjudication of the controversy. AT&T argues that class treatment is not superior to other methods, primarily because the task of administering a case involving such a potential large number of members would overwhelm the resources of the Trial Court.

In determining the superiority of a class action, a trial court is required to balance the benefits the class action has over alternative methods of adjudicating the claims against the management problems which may arise from class treatment. *Lobo Exploration Co. v. Amoco Prod. Co.*, 1999 OK CIV APP 112, ¶ 15, 991 P.2d 1048, 1054. As the Trial Court did in the instant case, the *Lobo* trial court reasoned that each individual claim would be small (around one dollar a month for each plaintiff) relative to the costs of litigating the claim. The Court of Civil Appeals stated:

> Therefore, individual litigation of their claims would be difficult or impossible for the members and would substantially increase the burden on the court system. [The trial court] concluded the litigation was more manageable as a class action than if undertaken individually, even though management problems would arise. We find no abuse of discretion in the trial court's action.

Id.

In its order, the Trial Court referred to *Lobo* and concluded, "Considering the extremely low amount of damages suffered by each individual class member, a class action is effectively

the only way such a case could be successfully adjudicated." We find no fault with the Trial Court's reasoning.

G. Declaratory Relief

Title 12 O.S.2001 § 2023(B)(2) allows the class to seek injunctive relief, where the prerequisites of subsection A are satisfied and where "[t]he party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." AT&T asserts that if relief is appropriate, it is through money damages and not declaratory/injunctive relief.

According to the Trial Court, "[t]he primary relief sought by Plaintiffs is to force AT&T to correct the problem so that customers like the Allens will not be overcharged in the future." The question of whether a court should grant declaratory relief goes to the appropriateness of that particular procedure or remedy for the particular controversy. *Ethics Comm'n of State of Okla. v. Cullison*, 1993 OK 37, ¶ 6, 850 P.2d 1069, 1073. In this instance, if Plaintiffs' claims are true and the conduct at the heart of the lawsuit is ongoing, then it may be appropriately addressed by declaratory relief. However, at this stage of the proceedings, it is simply too early to determine potential relief. Those are matters for the Trial Court to consider at the proper time and not here in the certification phase.

CONCLUSION

We hold that the Trial Court had jurisdiction over the matter, and did not abuse its discretion in certifying this case as a class action.

AFFIRMED.

TAYLOR, P.J., and GOODMAN, J. (sitting by designation), concur.

June 10, 2003

APPENDIX B

IN THE COURT OF CIVIL APPEALS
STATE OF OKLAHOMA
DIVISION II

[Filed Mar. 18, 2003]

Case No. 97,916
Not for Official Publication

BOBBY GENE ALLEN and DEBORAH JANE ALLEN,
on behalf of themselves and all others similarly situated,
Plaintiffs/Appellees,

vs.

AT&T CORPORATION,
Defendant/Appellant.

APPEAL FROM THE DISTRICT COURT OF
MUSKOGEE COUNTY, OKLAHOMA

HONORABLE MIKE NORMAN, TRIAL JUDGE

AFFIRMED

OPINION BY RONALD J. STUBBLEFIELD, JUDGE:

This is an appeal by defendant AT&T Corporation from an interlocutory trial court order certifying a class action lawsuit.[1] From review of the record on appeal and applicable law, we affirm.

BACKGROUND

Plaintiffs, Bobby Gene Allen and Deborah Jane Allen, a married couple, are customers of AT&T, the telecom-

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[1] Such an order is appealable by right pursuant to 12 O.S.2001 § 993(6).

munications company. AT&T provides Plaintiffs with their long distance telephone service. Plaintiffs live in an unincorporated area outside the City of Muskogee.

Plaintiffs' lawsuit concerns the validity of a municipal sales tax charge included in their monthly long distance bill, Many cities, including Muskogee, require phone customers to pay this tax, which is separate from the sales tax levied on telephone use by the state. For example, the State of Oklahoma levies a 4.5 percent state sales tax, and the City of Muskogee charges a 3.25 municipal sales tax. Because Plaintiffs live in an unincorporated area outside Muskogee, their long distance charges are subject to the state tax but not the municipal tax.

Plaintiffs asserted that AT&T charged the same municipal tax for all its customers residing in any one zip code, even those customers residing outside city limits. Plaintiffs produced one of their monthly AT&T bills, showing they had been charged the Muskogee municipal sales tax as well as the Oklahoma sales tax. Plaintiffs asserted AT&T was wrongfully collecting this money from nonresidents of any given city, remitting to the taxing authorities the amount properly owed, and pocketing the improperly charged amount "[i]n order to enhance profits and reduce accounting costs." Plaintiffs acknowledged that after contacting AT&T about the problem, they received a one-month credit of 74 cents and were no longer being charged the tax.

Plaintiffs filed their petition, individually and as a class action, seeking damages for restitution, fraud,[2] and breach of contract. Plaintiffs also sought declaratory relief and an injunction prohibiting AT&T from imposing the charge where unauthorized.

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[2] Plaintiffs did not attempt to certify the fraud claim as part of class action.

AT&T denied charging a flat rate per zip code to its customers, admitting only that a previously-used computer software system had resulted in billing errors, including some related to whether a customer lived inside or outside a city's limits. AT&T asserted it had issued credits to customers who were improperly billed.

AT&T filed a motion to dismiss, asserting that the Trial Court lacked jurisdiction because Plaintiffs did not seek a tax refund from the Oklahoma Tax Commission before filing their lawsuit. The Trial Court denied the motion.

After receiving a good deal of evidence and conducting a hearing, the Trial Court issued a 27-page order granting class certification, with the class defined as:

> All AT&T customers, residing in one of the following states, that were charged money as a city or a municipal tax on long distance services made from their service location where they did not reside within the incorporated boundaries of that city or municipal taxing jurisdiction:
>
> Alaska, Arkansas, Arizona, California, Colorado, Florida, Iowa, Illinois, Kansas, Kentucky, Maryland, Minnesota, Mississippi, Missouri, Nebraska, New York, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, Wisconsin, West Virginia, Wyoming.[3]

AT&T appeals.

STANDARD OF REVIEW

In an appeal from a trial court's certification of a class action, our standard of review is whether the trial court abused its discretion. *Shores v. First City Bank Corp.*, 1984

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[3] The Trial Court noted these 28 states are the only ones in the United States permitting cities to impose sales tax on long distance calls.

OK 67, ¶4, 689 P.2d 299, 301. Class actions are governed by 12 O.S.2001 § 2023, which specifies five prerequisites for class certification. The trial court abuses its discretion if the record fails to support the conclusion that each of the five prerequisites of that statute is met. *Id.* Those prerequisites are set out and analyzed below.

DISCUSSION OF ISSUES

I. Jurisdiction

AT&T first argues, as it did below, that Plaintiffs' lawsuit should be dismissed for failure to exhaust administrative remedies. Plaintiffs did not seek a refund from the Oklahoma Tax Commission. (OTC) for any amounts overpaid, and AT&T asserts that because OTC has exclusive jurisdiction over tax refunds, this case must be dismissed for lack of subject matter jurisdiction.

Oklahoma tax statutes do provide a procedure whereby taxpayers who have erroneously paid any tax can seek a refund from OTC and then, if unsuccessful, seek relief from the Oklahoma Supreme Court. See 12 O.S.2001 §§ 227 and 228. The Supreme Court has stated that an action for a refund of rates which a consumer believes are excessive is a matter in which a state agency has exclusive jurisdiction, *Wilson v. Harlow*, 1993 OK 98, ¶25, 860 P.2d 793, 800-01 (an action between a utility company and the OTC). Furthermore, several other jurisdictions have addressed the alleged overcharge of sales tax by companies providing telephone service and have held that administrative remedies must be exhausted before judicial relief can be sought. *See P.R. Mktg. Group, Inc. v. GTE Fla., Inc.*, 747 So.2d 962 (Fla. Dist. Ct. App. 1999), which involved a class action; and *Davidson v. Rochester Tel. Corp.*, 558 N.Y.S.2d 1009 (N.Y. App. Div. 1990). In *Serna v. H.E. Butt Grocery Co.*, 21 S.W.3d 330 (Tex. App. 1999), the Texas Court of Appeals was faced with a case in which a grocery store admittedly overcharged sales

tax to customers and then remitted the collected money, including the overage, to the State. The court held that a customer's exclusive remedy was to proceed through administrative channels.

There is one fundamental difference between the facts of these cases requiring the pursuit of an administrative remedy, and the allegations of this case. In those cases requiring exhaustion of administrative remedies, the wrongly collected taxes had been remitted to the taxing authority. Thus, in each case, the "beneficiary of the sales tax windfall" was the state involved. *Serna* at 335.

In contrast, Plaintiffs' claim is that AT&T collected municipal sales taxes, not as trustee for the city or state, but wrongfully *kept the money for itself.* Plaintiffs have no complaint with the fact that the tax exists, or that the tax is fixed at a certain rate, or that cities are entitled to receive the tax. They maintain that their dispute is not with the State of Oklahoma nor with OTC, because those entities do not have their money.

We find this distinction to be crucial. AT&T's argument that Oklahoma law forbids a consumer from directly suing a vendor to recover money paid as a tax misses the point of Plaintiffs' lawsuit. It is this element of Plaintiffs' claim—that the monies they seek, on their own and on behalf of others, were never received by the taxing authority—which distinguishes the case. AT&T's argument also ignores language in the Oklahoma statutory administrative remedy providing for refunds where a taxpayer "has paid to the State" an erroneous amount of tax. 68 O.S.2001 § 227(a). If the facts alleged by Plaintiffs are true, then AT&T's argument would require taxpayers to seek refund from the State of monies never received by the State. Clearly, that is not the intent of the law.

In short, because Plaintiff's' lawsuit seeks money allegedly held by AT&T, and not money paid to the State, Plaintiffs were not required to exhaust administrative remedies.

II. The Class Action

A. Prerequisites

Title 12 O.S.2001 § 2023 states as follows:

> A. PREREQUISITES TO A CLASS ACTION. One or more members of a class may sue or be sued as representative parties on behalf of all only if:
>
> 1. The class is so numerous that joinder of all members is impracticable;
>
> 2. There are questions of law or fact common to the class;
>
> 3. The claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> 4. The representative parties will fairly and adequately protect the interests of the class.
>
> B. CLASS ACTIONS MAINTAINABLE. An action may be maintained as a class action if the prerequisites of subsection A of this section are satisfied and in addition:
>
> * * * *
>
> 2. The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> 3. The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members,

and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

a. the interest of members of the class in individually controlling the prosecution or defense of separate actions,

b. the extent and nature of any litigation concerning the controversy already commenced by or against members of the class,

c. the desirability or undesirability of concentrating the litigation of the claims in the particular form, and

d. the difficulties likely to be encountered in the management of a class action.

AT&T asserts that none of the five prerequisites were met.

B. Numerosity

Numerosity requires that the class be "so numerous that joinder of all members is impracticable." 12 O.S.2001 § 2023(A)(1). The Oklahoma Supreme Court has stated that this requirement is satisfied by numbers alone where the size of the class is in the hundreds. *Black Hawk Oil Co. v. Exxon Corp.*, 1998 OK 70, ¶17, 969 P.2d 337, 343.

The Trial Court noted in its order that AT&T, through its responses to interrogatories and the testimony of its tax director, conceded that its former zip code system used to determine local taxes was inadequate, and that new software installed in the mid-1990's indicated over a million residential customers had been improperly billed for city taxes, resulting in overcharges of $5,000,000. The Trial Court accordingly found that this element was indisputably present and easily satisfied.

Certainly, the size of the proposed class meets the prerequisite of numerosity. In fact, AT&T does not argue that the sheer number of potential plaintiffs identified in the class does not meet this requirement. Instead, AT&T argues that the class has not been adequately defined, as numerosity requires. *See, for example, KMC Leasing, Inc. v. Rockwell-Standard Corp.*, 2000 OK 51, ¶15, 9 P.3d 683, 689. AT&T asserts that it will be difficult to identify class members, because individualized inquiries will have to be made to determine where calls originate and where customers reside.

In part, this argument is based on AT&T's "two out of three" method used to determine whether city sales tax applies. Under this method, as AT&T's tax director testified, the tax is due when two out of three factors in any call take place in a city limits: (1) the origination point (where the call is made); (2) the termination point (where the call is received); and (3) the service location, or service address (generally defined as the location of the telephone equipment from which a call is originated or, in the case of collect calls, received); AT&T asserts, for example, that when an out-of-city residential customer uses a calling card from an in-city location, individualized customer records will have to be examined to determine if the tax is due.

We disagree with AT&T's argument for several reasons. First, as a practical matter, this appears to be no more a problem than in other consumer class actions, in which prospective members are identified through receipts, bills, or customer records. Given the detailed information provided in the AT&T bills submitted into the record, and AT&T's own detailed customer information system, we do not see this as a reason to defeat certification. The Trial Court's order, in fact, notes the testimony of the tax director to the effect that identification of class members could be accomplished using AT&T's existing information.

Second, the Trial Court's order appears to minimize some of the problems associated with identification. It limits the class to customers making long distance calls "from their service location," which would by definition be calls made from outside a city limits.

Third, the facts of the instant case are clearly different than those in *KMC*, upon which AT&T relies. *KMC* involved an action filed by purchasers of the Aero Commander aircraft. There, the Supreme Court concluded, "There is no single course of conduct by appellees alleged to have caused injury and it is impossible for claims to be based upon one legal theory as to all appellees." *Id.* at ¶16, 9 P.3d at 689. In contrast, Plaintiffs assert AT&T committed a single course of conduct that injured everyone in the class in the very same way. We conclude the record supports the finding of numerosity.

C. Commonality

Commonality requires that there are "questions of law or fact common to the claims." 12 O.S.2001 § 2023(A)(2). There is little question that this requirement is satisfied. Each potential class member is a customer of AT&T; each resides outside a city limit; each has allegedly been wrongly billed for a municipal tax; and each has allegedly been damaged in an identical manner by identical acts committed by AT&T. Whether AT&T acted tortiously, and whether it is liable for its acts, are common questions. The Trial Court addressed this prerequisite in its order as follows:

> As the Federal court noted in its order remanding this case, the crux of this case is whether individuals living in an unincorporated area outside of the limits of any city are subject to a charge by AT&T for a municipal sales tax on their phone bill. This is the one overwhelming central issue for all Class members.

According to AT&T, this requirement cannot be met because the Trial Court would be faced with a series of individualized questions regarding where each class member lived and how different states and local jurisdictions might treat the phrase "service location." We fail to see the logic of this argument. Determining whether a customer resides inside or outside the city limits is not a matter dependent on differing state laws. Also, the laws of the various states are similar in that it appears the city tax, wherever applied, never applies to anyone residing outside the city limits.[4]

Furthermore, an analysis of fairly recent cases supports the correctness of the Trial Court's decision regarding commonality. In *Bunch v. KMART Corp.*, 1995 OK CIV APP 41, 898 P.2d 170, the Court of Civil Appeals held that plaintiffs could not satisfy the commonality prerequisite as to common questions of fact (because each plaintiff would have to prove reliance) or of law (because different states had significant differences in their substantive law of fraud).

Bunch was subsequently distinguished by the Oklahoma Supreme Court in *Black Hawk Oil Co. v. Exxon Corp.*, 1998 OK 70, 939 P.2d 337, which involved "clearly different and more uniform actions." *Id.* at ¶30, 939 P.2d at 345. In *Black Hawk*, the defendants allegedly failed to account for slop oil in monthly accountings rendered by them to a specific class of oil producers. The court quoted *Newberg on Class Actions* for the principle that "[t]he need to show individual reliance has not precluded class treatment in cases where standardized written misrepresentations have been made to class members." *Id.*

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[4] For these reasons, we cannot agree with AT&T that a conflict of law problem exists at this stage of the proceedings. Under general conflict of law principles, when the laws of two or more jurisdictions would produce the same result as to the particular issue presented, there is a "false conflict" and the court should avoid the choice of law question. *Williams v. Stone*, 109 F.3d 890, 893 (3rd Cir. 1997).

Of course, the instant case does not involve a fraud theory. We mention *Bunch* and *Black Hawk* to contrast the differences among cases analyzing the commonality requirement. Certainly the facts of the instant case are closer to *Black Hawk's* facts. As in *Black Hawk*, the instant case involves standardized monthly accountings, in the form of AT&T monthly bills which either do or do not charge a customer a city tax.

Finally, there is evidence in the record indicating similarities among all the states as far as Plaintiffs' theories of restitution and breach of contract are concerned. We conclude the commonality prerequisite was satisfied.

D. Typicality

Typicality requires that the claims or defenses of the representative parties be typical of the claims or defenses of the class. 12 O.S.2001 § 2023(A)(3). This requirement is satisfied "[w]hen it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented . . . irrespective of varying fact patterns which underlie individual claims." *Ammons v. Am. Family Mut. Ins. Co.*, 897 P.2d 860, 863 (Colo. Ct. App. 1995), quoting *Newberg on Class Actions*.

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We agree. Typicality focuses on the similarity of the legal and remedial theories behind the class members' claims. *Lobo Exploration Co. v. Amoco Prod. Co.*, 1999 OK CIV APP 112, ¶17, 991 P.2d 1048, 1055. Plaintiffs' legal theories

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Some of AT&T's arguments on this point are repetitive of earlier arguments we have considered and rejected. AT&T also asserts Plaintiffs will not be able to adequately represent the class because they lacked personal knowledge of their claims and abdicated their role to their attorneys.

As the Trial Court did, we reject this argument. At the core of this case are some basic assertions: Plaintiffs were billed for a tax; the tax is owed by residents of a municipality; Plaintiffs live outside the municipality. The Trial Court order indicates Plaintiffs understand the basic, consumer-oriented issues involved. Plaintiffs indicated they were able to identify the tax, calculate its amount, and complain to AT&T that they did not live within the taxable area. Contrary to AT&T's arguments there is no requirement that class representatives must have knowledge of the law governing telecommunication taxes or AT&T procedures. The record does not demonstrate that Plaintiffs lack personal knowledge of the underlying circumstances of the lawsuit. To the contrary, it indicates they possess the required knowledge to satisfy this prerequisite.

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G. Declaratory Relief

Title 12 O.S.2001 § 2023(B)(3) allows the class to seek injunctive relief, where the prerequisites of subsection A are satisfied and where "[t]he party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." AT&T asserts that if relief is appropriate, it is through money damages and not declaratory/injunctive relief.

We have examined Plaintiffs' amended petition. Regarding this remedy, the amended petition simply seeks a judicial declaration as to the validity of the tax as to class members. According to the Trial Court, "The primary relief sought by Plaintiffs is to force AT&T to correct the problem so that customers like the Allens will not be overcharged in the future."

The question of whether a court should grant declaratory relief goes to the appropriateness of that particular procedure or remedy for the particular controversy. *Ethics Comm'n of State of Okla. v. Cullison*, 1993 OK 37, ¶6, 850 P.2d 1069, 1073. In this instance, if Plaintiff's claims are true and the conduct at the heart of the lawsuit is ongoing, then it may appropriately be addressed by declaratory relief. However, at this stage of the proceedings it is simply too early to determine potential relief. Those are matters for the Trial Court to consider at the proper time and not here in the certification phase.

CONCLUSION

We hold that the Trial Court did not abuse its discretion in certifying this case as a class action.

AFFIRMED.

COLBERT, V.C.J., and TAYLOR, P.J., concur.

March 18, 2003

APPENDIX C

IN THE DISTRICT COURT IN AND FOR
MUSKOGEE COUNTY,
STATE OF OKLAHOMA

[Filed May 31, 2002]

Case No. CJ-99-2168
Class Action

BOBBY GENE ALLEN and DEBORAH JANE ALLEN,
on behalf of themselves and all others similarly situated,
Plaintiffs,

v.

AT&T CORPORATION,
Defendant.

ORDER GRANTING CLASS CERTIFICATION

This cause is before the Court on Plaintiffs' Motion for Class Certification. This Court has reviewed and considered all of the pleadings in this matter, the parties' respective briefs, the documents, presentations, admissions, witness testimony and arguments received in evidence during the class certification hearing commenced on March 18, 2002. Additionally, this Court has considered the post-certification submissions. The foregoing information has been duly considered by this Court in performing its rigorous analysis of the facts as they pertain to class certification. This Court now enters this Order Granting Class Certification as follows:

PROCEDURAL POSTURE:

On December 9, 1999, Bobby Gene Allen filed his Petition in the District Court in and for Muskogee County, Oklahoma, on behalf of himself and those similarly situated seeking

relief from Defendant's improper collection of money under the guise of a municipal or city sales tax on his telephone bill because he lives in an unincorporated area outside the limits of any city and is not responsible for paying such a tax. The Petition requested, a declaratory judgment, an injunction, restitution for money had and received, and damages for fraud and breach of contract. Plaintiffs seek certification of their injunctive and declaratory judgment claims pursuant to § 2023(B)(2), and certification of their restitution claims for money had and received and breach of contract pursuant to § 2023(B)(3).

On January 5, 2000, Defendant filed its answer to Plaintiff's Petition. On January 14, 2000, Defendant filed its notice of removal contending that Plaintiff's claims arise under the Communications Act of 1934 or are completely preempted by federal law. Additionally, defendants presented sworn testimony that the cost of compliance with the declaratory and injunctive relief would exceed $100,000,000, which, it argued, met the amount in controversy requirements for diversity jurisdiction. The federal court rejected both of Defendant's arguments and remanded the case.

Defendant fled its first Motion to Dismiss arguing that this Court lacked jurisdiction over the subject matter, the complaint failed to state a claim, and preemption under the Communications Act of 1934. Primarily, the Defendant asserted that the Oklahoma Tax Commission has exclusive jurisdiction over the claims made by Allen and that Allen was required to exhaust administrative remedies before filing suit. This Court denied the motion after briefing and a full hearing on the matter. Extensive discovery was conducted. The parties exchanged documents, responded to interrogatories, and took depositions.

Plaintiff Bobby Gene Allen amended his Complaint to add his wife, Deborah Jane Allen, as an additional named plaintiff. An evidentiary hearing on class certification was

held on March 18, 2002. Plaintiffs sought to certify their declaratory judgment and injunctive claims pursuant to § 2023(B)(2) and their breach of contract and money had and received claims pursuant to § 2023(B)(3). Plaintiffs did not attempt to certify their fraud claim.

FACTS:

AT&T is the world's largest long distance carrier with over 80 million customers. Through the mid 1980's, AT&T provided 100% of the long distance service in the United States of America. Eventually, federal legislation required competition to be introduced into the long distance market. Despite the introduction of other carriers in Oklahoma and elsewhere, AT&T still serves over 38% of all residential and business long distance customers in the United States.

AT&T bills its customers for and collects sales tax in Oklahoma and in other states that collect sales tax on telecommunication services. Although the rules for application of sales tax to a given service can vary dependent on several factors, long distance service provided to a customer at his service location is a simple determination based on the rate that applies to that customer's physical location. The correct use or sales tax rate for each jurisdiction is publicly available information published by the Departments of Revenue in each state.

These tax rates vary according to the jurisdiction in which the customer resides. There are local taxing authorities within each state that may require remittance of local sales tax in addition to state sales tax. This additional local sales tax is imposed by municipal authorities and may differ from jurisdiction to jurisdiction throughout the state.

AT&T has a proprietary billing system which identifies each of its customer's accounts with a particular "geo-code" or designation which identifies what tax rate should be systematically applied to the long-distance charges made

from the service location on each customer's bill. When AT&T's system incorrectly categorizes an account as being within the city limits, a city tax is applied to all long distance calls made from that customer's service address. AT&T has an "Outside City Limits" or "OCL" indicator which tells AT&T's system to charge city tax to the customer if the indicator is marked "N" meaning the customer is not outside the city limits. Conversely, if the OCL indicator is marked "Y," then the customer is categorized as living outside city limits and is not charged the city tax. For example, a resident of the City of Muskogee is required to pay a 4.5% state sales tax and an additional 3.25% Muskogee city sales tax for a combined tax rate of 7.75%. If that citizen were an AT&T customer, their OCL indicator should be marked "N" because they do not reside outside the city limits of Muskogee and all the long distance calls made from their service location should be charged 7.75%. In comparison, an AT&T customer who resides in an unincorporated area outside Muskogee city limits is required to pay the Oklahoma state sales tax of 4.5% but is not legally obligated to pay the Muskogee city sales tax of 3.25%, and their OCL indicator should be marked "Y." This case concerns AT&T customers who live outside the city limits of thousands of cities across the country but are being charged city tax. In other words, AT&T has incorrectly marked their OCL indicator as "N" when it should be marked "Y."

Sometime between 1995 and 1997, AT&T identified thousands of its residential customers who were overcharged in this manner and provided a partial refund. Importantly, AT&T only attempted to refund current residential customers of AT&T for amounts overcharged. It did not attempt to refund the overcharge to former AT&T customers or to businesses that were overcharged. AT&T claims and collects reimbursement from the taxing authorities for amounts it refunds to customers as incorrectly collected.

On March 21, 1996, Plaintiffs received a phone bill from AT&T representing that they owed AT&T $25.90 for charges before taxes and owed state and local taxes of $1.98. This figure included state sales tax at 4.5% of $25.90 or $1.17 as well as Muskogee city sales tax of $.84 or 3.25% of $25.90. However, the Allens live outside the city limits of Muskogee and should not have been charged Muskogee city tax.

Mr. Allen testified that he periodically reviewed his telephone bill and noticed the local tax. Believing that the bill was improperly charging him for city tax, Mr. Allen contacted AT&T to correct the problem on more than one occasion. AT&T continued to charge Mr. Allen for Muskogee city tax through 1999. After additional complaint, AT&T refunded one month of overcharge to the Allens. AT&T's stated corporate policy and practice is to refund all amounts over-collected from a customer back to the inception of the account.

THE CLASS DEFINITION:

Plaintiffs redefined the Class at the class certification hearing as follows:

> All AT&T customers, residing in one of the following states, that were charged money as a city or a municipal tax on long distance services made from their service location when they did not reside within the incorporated boundaries of that city or municipal taxing jurisdiction:
>
> Alaska, Arkansas, Arizona, California, Colorado, Florida, Iowa, Illinois, Kansas, Kentucky, Maryland, Minnesota, Mississippi, Missouri, Nebraska, New York, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, Wisconsin, West Virginia, Wyoming.

NUMEROSITY

Oklahoma Pleading Code § 2023(A)(1) requires that the proponent of a class action demonstrate that "the class is so numerous that joinder of all members is impracticable." "The numerosity test is satisfied by numbers alone when the size of the class is in the hundreds." *Black Hawk Oil Co. v. Exxon Corp.*, 969 P.2d 337 (Okla. 1998). Plaintiff offered evidence through discovery documents produced by AT&T that AT&T incorrectly billed and collected money from thousands of individuals as a "local tax" or a "city tax" but which was not due and owing because those individuals did not reside within the incorporated local taxing jurisdiction.

First, in AT&T's responses to interrogatories and through the testimony of Elizabeth Bopp, one of AT&T's corporate representatives, AT&T testified that it knew the zip code based system (Vertex) it was using to determine local taxes was inadequate. This inadequacy prompted AT&T to augment both its residential and commercial billing systems with new software (Vality and Group One respectively) beginning in 1996 and completed in 1998. After incorporating the additional software, AT&T testified that it performed a "scrub" of existing residential accounts which identified over a million residential customers that were improperly billed for city taxes. Plaintiffs also offered summaries from the scrub evidencing that over $5,000,000 was improperly billed and collected by AT&T.

Second, Plaintiffs presented documents demonstrating that there were numerous business and residential customers who complained of improper application of city taxes on their bills after the AT&T scrub which indicates that the problem has not been resolved. These customers were from within the state of Oklahoma as well as several of the other states identified in the class definition including, Illinois, California, Ohio, Arkansas, Washington and Florida.

Pursuant to documents also proffered by the Plaintiffs, AT&T is already subject to a permanent injunction regarding the activity complained of in this lawsuit issued by a California state court. In that suit, AT&T was permanently enjoined and restrained from billing for, or collecting a tax for a particular jurisdiction which it knows or should know is not subject to such a tax. AT&T was also ordered to maintain appropriate corrective measures to accurately determine the applicable tax for each of those customers. That case was limited to a particular jurisdiction. While AT&T claims that the technological improvements it made between 1996 and 1998 have largely corrected the OCL problem, the California injunction issued in the year 2000 and constitutes evidence to the contrary. Thus, there is substantial evidence which indicates that AT&T's alleged corrective measure did not eliminate the problem and that there are still thousands of accounts that are potential class members.

Next, AT&T has so many customers that the admitted error rate of its system results in a huge group of individuals who would be members of the class as defined. Plaintiffs showed an admitted 2% error rate presented by the third party vendor currently supplying the geo-code software to AT&T. Because AT&T is estimated to have between 80 and 90 million customers, there are currently hundreds of thousands of customers who are not billed correctly when the applicable 2% error rate is considered.

Finally, at the Defendant's insistence, Plaintiffs presented the Court with copies of two additional bills, one from a residential customer and one from a business customer, which appear to assess Muskogee city tax to accounts whose address places them clearly outside the city limits of Muskogee.

AT&T contends that individualized factual determinations must be made to determine which calls were made from each class member's "service location" and that such an inquiry precludes a finding of numerosity. While this argument may

address the predominance or commonality requirement as to the degree of individualized inquiry required to determine refunds to potential class members, it does not address Plaintiffs' showing of numerosity. There was substantial evidence presented by Plaintiff to show that there are a large number of customers who have been wrongfully labeled as living inside city limits when, in fact, they do not.

From these facts and others presented at the class certification hearing, this Court finds that it is indisputable that joinder of all members of the class would be impracticable and thus, the numerosity requirement is easily satisfied under the proposed Class definition.

COMMONALITY

Oklahoma Pleading Code § 2023(A) does not require that all questions be common or that common questions predominate. Indeed, in the court's § 2023(A) inquiry, a single common question is sufficient to satisfy this requirement. *See Perry v. Meek*, 618 P.2d 934 (Okla. 1980). Here, commonality exists among Class members because the claims of each potential Class member relate to a systematic overcharge made in an identical manner. The questions of law and fact common to the Class include, among others:

What are AT&T's obligations with respect to customers who have been charged for city tax but who do not live inside the city limits?

Does AT&T's practice of setting the default on its billing system to charge for city tax when the customer's exact location is uncertain result in improper charges?

Does AT&T have a duty to inquire of its customers whether or not their service location is outside or inside the city limits?

As the Federal court noted in its order remanding this case, the crux of this case is whether individuals living in an unincorporated area outside of the limits of any city are

subject to a charge by AT&T for a municipal sales tax on their phone bill. This is the one overwhelming central issue for all Class members.

Plaintiffs demonstrated that their claims against AT&T arise from the same set of alleged operative facts that would create a claim for any class member who lives outside city limits but is being charged a city tax on calls made from their service location. Whether AT&T should know precisely where its customers are located and whether AT&T is required to inquire directly of its customers whether they are located inside the city limits are questions that are due to be determined on a class basis. Forcing thousands of individuals to file identical individual actions for such small amounts of damages would burden the courts unnecessarily. It is unlikely that those individuals would have discovered their legal rights and retained counsel willing to pursue such small claims on an individual basis, in any case.

AT&T contends that there are no common issues because the taxability of each and every call is an individualized inquiry that necessarily requires the examination of a host of particular facts as well as the applicable laws of each state. This position is simply not supported by the facts. First, when Plaintiffs put AT&T on notice that he was being overcharged AT&T did not undertake any such analysis in correcting his account. AT&T admits in its brief that it investigated, "issued a refund for the city tax and adjusted its billing system so that [the account] would not be assessed city taxes on any direct-dial calls made after that date." Plaintiffs also offered documentary evidence that changing AT&T's "OCL indicator" to the correct position will remedy the problem complained of in this lawsuit by applying the correct rate to all future calls. Numerous AT&T documents state: "If a customer lives outside the city limits this indicator should be populated with a Y and therefore, this customer will not be charged the city tax."

Furthermore, the evidence presented showed that AT&T was able to identify customers overcharged in this manner and make refunds in the past without the alleged individualized inquiry it now claims is necessary. The internal "scrub" performed by AT&T simply determined which accounts were changed from inside city limits to outside city limits. AT&T determined from that information which customers were incorrectly charged and due a refund. Accordingly, there is not merit to its argument now that individualized determinations will defeat commonality.

Defendant argued that the potential class could not be identified. Yet AT&T's corporate representative, Elizabeth Bopp, testified on her direct examination at the class certification hearing that it is possible for all potential class members to be identified as follows:

Q (By Mr. McKinney) Ms. Bopp, would it be possible for Plaintiffs today to identify the identities or names and addresses of possible persons outside of the city limits who might be charged a city tax?
A For the current period?
Q Yes.
A I'm sure we could identify the customers that have OCL indicators that have theirs set.
Q Okay.
A Whether it was through mailing or calling customers. Through the current customer base absolutely, yes.
Q Okay. Would every customer have an OCL setting on his or her records?
A It would be either yes or no. I am not aware of any blanks.

As a result, the identification of the class members is possible and supports class certification.

AT&T attempted to overcomplicate this case by including circumstances not contemplated by this proposed class. AT&T, both in its brief and at the certification hearing,

continually refers to situations such as calling card calls which, they allege, would require a call-by-call analysis in order to determine whether the customer was improperly charged city tax. Such facts are not contemplated by the amended class definition which only encompasses calls made from the service location. AT&T representatives testified that calls made with calling cards and calls made from the service location have different identification numbers which enables AT&T to determine how they should be billed. The Defendant cannot insert facts and issues into the case by attempting to broaden the reach of the claims as advanced by the Plaintiffs in order to defeat class certification. The proposed class focuses solely on the systematic application of a city tax to direct dial long distance calls made from the actual service location of the customer which, according to AT&T's own documents, can be corrected by changing the OCL indicator. There is no need to look at each individual call to determine whether a customer is inside or outside the borders of a city and to have that OCL indicator corrected. Therefore, the Defendant's allegation that an individual analysis of each call is required is not supported by any evidence and does not rebut the showing made by Plaintiffs that common issues of law and fact exist.

Likewise, AT&T insists that an individual analysis of different tax laws is necessary for each jurisdiction. AT&T did not explain how the tax codes impact the analysis nor did it produce any documents or tax codes to support its position. Plaintiffs' expert contends that the rate charged by each local taxing jurisdiction is the only difference applicable to the overcharge complained of in this case and therefore, it is not necessary to examine tax laws to determine class membership. His argument is premised on the fact that persons identified as living outside the city limits who were charged a city tax on all of their long distance service were categorically overcharged. The issue is merely whether the customer lives within or without the city limits. Such an analysis does not

require the examination of any individual tax laws. AT&T's expert merely made blanket assertions that there are significant variations in tax laws, but failed to provide any analysis or factual support for how and why variations would impact Plaintiffs' claims. Accordingly, this Court finds that common questions of law and fact exist in this action and support class certification.

TYPICALITY

Typicality is not a high threshold. *Lobo Explorations Co. v. Armoco Productions*, 991 P.2d 1048, 1055 (Okla. Ct. App. 1999). The measure of whether a plaintiff's claims are typical is whether the nature of plaintiff's claims, judged from both a factual and legal perspective, are such that in litigating his personal claims, he can reasonably be expected to advance the interest of absent class members. *Scott v. University of Delaware*, 601 F.2d 76, 84 (3d Cir.), *cert. denied*, 444 U.S. 931 (1979).

In this case, Mr. and Mrs. Allen are AT&T customers who reside outside of the municipal limits of the City of Muskogee, Oklahoma but who were billed for and paid money to AT&T for Muskogee city taxes for a number of years. Plaintiffs presented evidence in the form of deposition testimony and billing statements demonstrating that the Allens are current AT&T customers and that they have not discontinued their relationship with AT&T at any time. The Allens claim that AT&T is required to charge the correct amount of tax to all customers and to refund any amounts collected improperly. This core claim will be the same for all class members with an incorrect OCL indicator. Thus, Plaintiffs assert that their claims are typical of those advanced by the Class.

AT&T argues that the Allen's claims are not typical on two grounds. First, AT&T argues that Bobby Jean Allen is not a typical class representative because the account was listed in

the name of his wife "DJ Allen" who was not the original named Plaintiff in this action. Defendant asserts that Mr. Allen is not a party to the "contract" between Mrs. Allen and AT&T and is not a real party in interest to this litigation, much less a typical plaintiff. The Allens are a married couple who are both liable for and pay the bills sent by AT&T. Testimony offered by defense witnesses and Plaintiffs show that AT&T treated Mr. Allen as an account holder when he called AT&T. Despite the fact that Mr. Allen's name never appeared on the bill, AT&T regularly discussed the Allen's account with him and made changes to the account based on discussions solely with him. Based on these facts, this somewhat technical distinction is irrelevant given that Mrs. Allen is named as an additional Plaintiff who seeks to represent the Class along with her husband.

Defendant's arguments against the typicality of Mrs. Allen are also unpersuasive. AT&T initially argues that Mrs. Allen is not a typical Plaintiff due to some discounted rates the Allens receive due to Mrs. Allen's former employment with AT&T. However, this distinction does not impact the nature of the claims advanced in the lawsuit in any way. Defendants failed to present any evidence that the Allens received discounts from AT&T, let alone that the discount would impact the nature of the claims as advanced.

Finally, Defendant argues that because Mrs. Allen was not brought in as a named Plaintiff until more than two years after AT&T corrected their account, her fraud claims are barred by the statute of limitations. This argument does not affect this Court's Order on class certification because Plaintiffs are not seeking certification of their fraud claim.

Thus, from both a factual and legal perspective, the Allens can reasonably be expected to advance the interests of the absent class members. This Court finds the claims of the representative Plaintiffs to be typical of the claims of the Class as required under § 2023(A)(3).

ADEQUACY OF REPRESENTATION

The Adequacy inquiry of § 2023(A)(4) focuses on whether the representative parties will fairly and adequately protect the interest of the Class. *Blackhawk v. Exxon*, 969 P.2d 337 (Okla. 1998). This analysis requires a two-fold inquiry. First, the Court must determine whether the Allens will adequately represent the Class. See *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 562 (2nd Cir. 1968). Second, the Court must determine whether counsel for the class is capable of effectively litigating the claims on behalf of the Class. *Id.*

In this case, there is nothing to suggest that the Allens have any interest antagonistic to the claims advanced on behalf of the Class. To the contrary, the deposition testimony of the named Plaintiffs shows they are familiar with the claims advanced in this litigation and are fully prepared to vigorously pursue the litigation on behalf of the Class. Both Plaintiffs testified that they understand the nature of the claims, what the lawsuit is about and the basic tenants of class action representation.

Defendant argues that the Allens are inadequate Class representatives because they have failed to exhaust administrative remedies before the Oklahoma Tax Commission. This Court previously rejected Defendant's characterization of this lawsuit as a claim for a tax refund in its rejection of AT&T's Motions to Dismiss. This is the law of the case. Defendant cannot change the character of Plaintiffs' case by defining the alleged overcharge as a tax. In this Court's view, the Defendant's arguments raised on the Motions to Dismiss which mirror the argument against adequacy are untenable. The amounts charged were not a "tax" simply because AT&T charged such amounts under the guise of a tax. Because this is not an action for a tax refund, Plaintiffs were not required to pursue any administrative remedies before any tax com-

mission prior to filing this action. Defendant has presented no evidence demonstrating that these Plaintiffs are inadequate as a result of not pursuing the alleged administrative remedies.

AT&T also contends that the Allens are inadequate representatives because they "lack the requisite knowledge to pursue their claims against AT&T on behalf of absent class members." In support of its position, AT&T cites *Kelley v. Mid-America Racing Stables, Inc.*, 139 F.R.D. 405 (W.D. Okla. 1990), which held that a total lack of knowledge of the facts underlying a securities fraud class action made the named class representatives inadequate. In *Kelley*, the deposition testimony of the named plaintiffs showed that they had no personal knowledge of basic facts of the case. *Kelley*, 139 F.R.D. at 410. One named plaintiff in *Kelley* stated that all his knowledge of the case came from his attorney whom he contacted on the advice of his broker before he had any knowledge of any wrongdoing by the defendant. *Id.* Such facts cannot be compared to this case. Mr. Allen explained in his deposition how he calculated the overcharge for city tax on his phone bill and how he complained to AT&T based on his knowledge that he should not be charged Muskogee city tax when he does not live within the city limits of Muskogee. Mr. Allen contacted his attorney based on his belief that he was due a refund for all improper overcharges and that he believed a similar overcharge may be occurring elsewhere. AT&T acknowledges Mr. Allen's complaint and states that the Allens account was "corrected" based on Mr. Allen's call. Both the Allens testified that they believe that they should not be charged Muskogee city tax because they live outside the city. These facts are the basis of the complaint in this action. AT&T contends that the Allens need to have specific knowledge and understanding of the telecommunications industry as well as the various applicable tax laws in order to be adequate class representatives under the rationale set forth in *Kelley*. Such an interpretation of *Kelley* is not consistent with the opinion and not applicable to the facts of this case.

The Court in *Kelley* found a "total lack of personal knowledge" of the claims submitted by the plaintiffs. *Id. Kelley* does not require total understanding of every legal aspect of the case at AT&T suggests, but merely that they understand the claims advanced. The Allens have clearly shown that they understand the basics of the claims advanced and they have stated that they are prepared to vigorously pursue the litigation on behalf of the class.

In addition, AT&T argues that the Allens have abdicated their role as named plaintiffs to their attorneys because the Allens did not appear in person at the class certification hearing. AT&T did not subpoena the Allens and was given the opportunity to postpone the hearing so that they could be present. AT&T declined the Court's offer and elected to proceed without the Allens being present. Plaintiffs presented the deposition testimony of both named Plaintiffs in support of their class certification presentation. AT&T had ample opportunity to question the Allens in deposition where each stated that they recognize their duty to represent the class. The attorneys' decision to present testimony through deposition and affidavit at the class certification hearing does not render the Allen's inadequate class representatives.

Finally, this Court notes that Plaintiffs have retained counsel highly experienced in class action litigation to prosecute their claims. Plaintiffs' counsel has been appointed class counsel in successful consumer litigation in numerous states, including the State of Oklahoma. Defendant does not challenge their ability to adequately represent the Class in this litigation.

Accordingly, because the representative Plaintiffs will adequately represent the interests of the Class, have no interest antagonistic to the Class, and have retained counsel well versed in class action litigation, this Court finds that the adequacy requirement of § 2023(A) has also been established.

THE REQUIREMENTS OF § 2023(B)

In addition to the requirements of § 2023(A), the case must meet the requirements of at least one of the three subsections of Oklahoma Pleading Code § 2023(B). *See also Blackhawk*, 969 P.2d at 343. Courts also recognize the possibility that more than one alternative under § 2023(B) may be applicable. *See In re A.H. Robins Co., Inc.*, 880 F.2d 709, 747-48 (4th Cir. 1989) (*quoting* 7A C. Wright, A. Miller and M. Cain, *Federal Practice and Procedure: Civil 2nd* at 425).

Plaintiffs seek certification of their declaratory and injunctive claims pursuant to § 2023(B)(2), and certification of their money had and received and breach of contract claims pursuant to § 2023(B)(3). After analyzing this case, this Court finds that it complies with the requirements of two of the three subsections of § 2023(B) and may be appropriately certified under both subsections.

Oklahoma Pleading Code. § 2023(B)(2)

Oklahoma Pleading Code § 2023(B)(2) applies to cases in which "the party opposing the class has acted or refused to act on a ground generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." An actual controversy has arisen and now exists relating to the rights and duties of the parties herein in that Plaintiffs contend that Defendant erroneously charged and collected money under the guise of a local sales tax. Plaintiffs contend money collected, or a portion thereof, was unauthorized by law and, therefore is to be returned to the consumer. Defendant contends that customers who it overcharges in this respect have no right to a refund unless and until they file a claim for a refund with the governing agency that regulates taxes in each state. Plaintiffs desire a declaration as to the validity of the charge and contend that the law of the case has already determined that this case does not involve a tax

refund because, by definition, the class members could not have owed any such tax. A judicial declaration is necessary and appropriate at this time so that Plaintiffs may ascertain their rights and duties, and those of other affected persons in regard to the appropriateness of the charge at issue.

This lawsuit also requests that Defendants be forced to delineate the amount being charged as a city tax and properly label the charge on the bill as a separate amount so that errors can more readily be detected by customers. Furthermore; Plaintiffs request that AT&T be required to disgorge all monies collected under the guise of a local tax that AT&T knew or should have known were not a tax along with interest thereon. Plaintiffs seek an injunction directing AT&T to contact each current customer and inquire of the customer whether they are located inside or outside the city limits. Plaintiffs also seek to enjoin AT&T from having its OCL indicator default set as N which causes additional unnecessary overcharges. Finally, Plaintiffs seek a permanent injunction prohibiting Defendants from further engaging in the wrongful conduct complained of herein. The primary relief sought by Plaintiffs is to force AT&T to correct the problem so that customers like the Allens will not be overcharged in the future.

Accordingly, this Court finds that the primary relief requested by this lawsuit is primarily injunctive or declaratory in nature making class certification appropriate pursuant to Oklahoma Pleading Code § 2023(B)(2).

Oklahoma Pleading Code § 2023(B)(3)

Plaintiffs also seek certification of an "opt out" class pursuant to § 2023(B)(3), which states certification is appropriate when:

> The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a

class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(g) the interest of the members of the class in individually controlling the prosecution or defense of separate actions,

(b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class,

(a)c the desirability or undesirability of concentrating the litigation of the claims in the particular forum, and

(d) the difficulties likely to be encountered in the management of a class action.

Okla. Stat. Ann. Tit. 12 § 2023(B)(3) (1991).

This subsection requires two basic findings: (1) that common questions of law and fact predominate (commonly referred to as "predominance"); and (2) that a class action is superior to other forms available for fair and efficient adjudication (commonly referred to as "superiority"). Okla. Stat. Ann. Tit. 12, § 2023 (1991). *See Lobo Exploration*, 991 P.2d at 1052 at 491. Both findings simply call for a qualitative and relative analysis of the case. *See Matton v. City of Norman*, 633 P.2d 735, 739 (Okla. 1981)(predominance "is a qualitative rather than a quantitative matter.")

Predominance

The predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation, and focuses on the relationship between the common and individual issues. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998). As previously demonstrated under the 23(A) inquiry, the legal issues involved in this action are

virtually identical as they pertain to each member of the Class since the core liability issues are based upon the same course of conduct by the Defendant. At the center of this case is AT&T's billing procedures. Regardless of minor variations in the factual circumstances of the absent class members, if AT&T's billing procedures are demonstrated to be flawed as they pertain to the Allens, then the class action mechanism will serve to adjudicate this issue for thousands of people. Each Class member paid money to AT&T under the guise of a local tax when they were not legally required to pay that fee because they do not reside within the city limits. AT&T employs the same software system with respect to identifying what amount to charge each customer for local taxes throughout the country.

As further proof that common questions predominate, this Court notes that other cases have been certified regarding precisely the same conduct. In *Jordan v. SkyMall*, CJ-98-208, District Court of Cherokee County, a sister Oklahoma trial court entertained an analogous class action. There, the plaintiff brought common law claims grounded in restitution, fraud, declaratory judgment, and breach of contract for SkyMall's alleged collection of a sales tax which was unauthorized in connection with merchandise purchased by the class from SkyMall's in-flight catalog company. That case was certified as a class action on a nationwide basis. The trial court necessarily found *SkyMall* to have met the predominance requirement of § 2023.

Defendant argues that individual issues preclude a finding of predominance because, they contend, individual factual determinations regarding individual calls and individual tax statutes from each taxing jurisdiction are required to determine whether each class member has a claim. However, AT&T failed to cite any statute where city taxes can be applied to customers living outside the city limits of the taxing jurisdiction. Plaintiffs' amended class definition includes

only those customers who are charged a fee for city taxes on calls made from their service location when that service location is outside the city limits of the jurisdictional rate applied by AT&T. Calls made from the service location can be identified through AT&T's billing software. Plaintiffs presented a trial plan wherein notice would be sent to all AT&T customers currently listed as living inside city limits. Each customer incorrectly listed could then be identified. Absent class members are often identified through precisely this same process. Once identified, a refund calculation can be easily made. AT&T has not shown how or why further "interpretation" of tax laws is necessary once it has been determined that the class member lives outside the city limits of a given city and has been charged a fee under the guise of the city tax.

Accordingly, this Court finds that common questions in this case predominate over any individual questions relating to members of the Class in that, if the common questions are not answered favorably to the Class, any potential individual questions will never arise.

Superiority

The named Plaintiffs aver that Defendant owes them restitution for any amounts wrongfully collected under the guise of a city sales tax along with interest or other benefits accrued thereon. Using the named Plaintiffs' claim as a benchmark, under $12.00 was overcharged to the Allens each year. The vast majority of individual class members are likely to also have substantially small claims. It is clear that most individual claims are not sufficiently substantial to support individual litigation. Oklahoma courts have readily acknowledged that class certification should be granted in situations where a class action would achieve economies of time, effort, and expense. *Lobo*, 991 P.2d at 1052. Considering the extremely low amount of damages suffered by each individual class member, a class action is effectively the only way such

a case could be successfully adjudicated. "The pragmatically correct action, in the face of a close question as to certification, has been said to sustain certification because if it develops later during the course of the trial that the order is ill-advised, the order is always (prior to judgment on the merits,) subject to modification." *Perry v. Meek*, 618 P.2d 934, 939 (Okla. 1980).

Furthermore, the policies underlying the rationale for class action treatment of "negative value" suits are the same polices at issue in the present case. By allowing plaintiffs with small individual claims to join together in one action, particularly where the claims involve a common issue of liability, courts promote efficiency and judicial economy, eliminate the risk of inconsistent or conflicting results, and provide plaintiffs with their only realistic mechanism for seeking recovery. *See Washington v. CSC Credit Services, Inc.*, 180 F.R.D. 309, 315 (E.D. La. 1998). In reality, the pursuit of these type claims can only be tried on a class basis.

The Court further notes that in the recently litigated case *Ting v. AT&T*, No. C 01-02969 BZ (N.D. Cal. Jan 15, 2002), which was certified as a class action against AT&T this year, the United States District Court judge specifically discussed this very issue and referenced this case finding that Mr. Allen's less than a $1.00 per month actual overcharge was too small to be litigated on anything other than a class action basis. This Court agrees. There are significant benefits to be derived from concentrating this action in this forum and there is no evidence that individual class members have any interest in individually controlling this litigation.

Accordingly, due to the relatively small amount of individual damages, the lack of individual issues, and the public policy behind consumer protection remedies, it is readily apparent that a class action is superior to other available methods for the fair and efficient adjudication of this matter.

Variations in State Law

As part of their burden in establishing that this case is proper for class certification, Plaintiff should evaluate the applicable law and determine that variations in state law do not make the case unmanageable. *See Castano v. American Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996). Plaintiffs contend and Defendant agrees that there are only 28 states which would have a taxing structure that would enable AT&T to overcharge as alleged in this lawsuit. Those states are: Alaska, Arkansas, Arizona, California, Colorado, Florida, Iowa, Illinois, Kansas, Kentucky, Maryland, Minnesota, Mississippi, Missouri, Nebraska, New York, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, Wisconsin, West Virginia, and Wyoming.

The Defendants continually cite to potential problems created by the class definition as stated in the original Petition. However, Plaintiffs suggested alterations in the definition to conform to the evidence and proffered the definition stated above at the time of the class certification hearing. Changes in class definitions that narrow the scope of the Class are readily accepted in class action practice. *See Greghol Limited Partnership v. Oryx Energy Co.*, 959 P.2d 596, 598 (Okla. Ct. App. 1998). Plaintiffs' claims for restitution of money had and received and for breach of contract represent well established claims that do not differ substantially from state to state. Accordingly, the laws governing the claims advanced in this action are substantially similar and do not act to defeat either the predominance or the superiority requirements of § 2023(B)(3).

Here, Plaintiffs have surveyed the law of all 28 states with regard to each claim advanced and determined that these causes of action are similar in all relevant aspects. To the extent that there are limited variations in the law of the claims, such variations can be managed by subclassing and do

not warrant the denial of class certification. Although Defendant argues that there are variations in the tax laws which would defeat predominance, Defendants did not produce any such laws at the class certification once Plaintiffs met their burden of showing that the law of the claims advanced are substantially similar.

In any case, the Court is entitled to assume that the laws of the other states are the same as Oklahoma's unless the other states' laws are both clearly established and plainly contradictory to the law of Oklahoma. *Sun Oil Co. v. Wortman*, 486 U.S. 717, 731, 732 n.4 (1988); *Sollenbarger v. Mountain States Telephone and Telegraph Co.*, 121 F.R.D. 417 (D.N.M. 1988); *In re School Asbestos Litigation*, 789 F.2d 996, 1009-10 (3d Cir. 1986). It is Defendant's burden of proof to show that the laws of the other states are both clearly established and plainly contradictory to Oklahoma law. *Sun Oil Co.*, 486 U.S. at 731, 732 n.4 (defendants' contention that non-forum state law contradicted law applied by forum court rejected because defendant pointed to no decision which contradicted the law applied by the lower court); *Western Life Indem. Co. v. Rupp*, 235 U.S. 261, 275 (1914) ("If such a decision existed, it was incumbent upon defendant to prove it as a matter of fact."); *In re Telectronics Pacing Systems, Inc.*, 172 F.R.D. 271, 287 (S.D. Ohio 1997) (burden of the party seeking application of non-forum state law to clearly establish what that law is and that it is clearly contradictory to the forum law); *Sollenbarger*, 121 F.R.D. at 420 (burden of the party seeking application of non-forum state law to clearly establish what that law is and that it is clearly contradictory to the forum law); *In re School Asbestos Litig.*, 789 F.2d at 1009-10. Absent such a showing by Defendants, this Court is entitled to assume that the laws of the other states are the same as Oklahoma's and it therefore can apply Oklahoma law. *Sun Oil Co.*, 486 U.S. at 731, 732 n.4. Accordingly, the laws governing the causes of action advanced in this action are substantially similar and do not act to defeat

either the predominance or the superiority requirements of § 2023(B)(3).

For the foregoing reasons, Plaintiffs Motion for Class Certification is granted as follows:

1. This case is hereby certified as a class action pursuant to Okl.St.Ann. § 2023(B)(2) and (B)(3).

2. The Class is defined as:

   All AT&T customers, residing in one of the following states, that were charged money as a city or a municipal tax on long distance services made from their service location when they did not reside within the incorporated boundaries of that city or municipal taxing jurisdiction:

   Alaska, Arkansas, Arizona, California, Colorado, Florida, Iowa, Illinois, Kansas, Kentucky, Maryland, Minnesota, Mississippi, Missouri, Nebraska, New York, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, Wisconsin, West Virginia, Wyoming.

3. Plaintiffs, Bobby Gene Allen and Deborah Jane Allen, are hereby appointed Class representatives.

4. Janet R. Varnell, Brian W. Warwick, Harry G. Scoufos III and Robert Locke are appointed class counsel.

5. Plaintiffs are instructed to provide this Court with a proposed procedure for providing notice to the Class within 60 days from the date of this Order.

/s/ Mike Norma
DISTRICT COURT JUDGE

APPENDIX D

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

Monday, September 29, 2003

THE CLERK IS DIRECTED TO ENTER THE FOLLOWING ORDERS OF THE COURT:

* * * *

97,916 BOBBY GENE ALLEN ETC., V. AT&T CORPORATION.
Petition for certiorari is denied.
CONCUR: Watt, C.J., Opala, V.C.J., Hodges, Lavender, Summers, JJ.
DISSENT: Hargrave, Kauger, Boudreau, Winchester, JJ.

/s/ Joseph M. Watt
CHIEF JUSTICE